Supreme Court, U. S.
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APPENDIX
VOLUME IV

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-863

UNITED STATES STEEL CORPORATION,
et al. . . . . Petitioners

versus

FORTNER ENTERPRISES, INC. - Respondent

On Writ of Certiorari to the United States Court
of Appeals For the Sixth Circuit

PETITION FOR CERTIORARI FILED DECEMBER 18, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 4392

Fortner Enterprises, Inc. - - - - Plaintiff

v.

United States Steel Corporation and
United States Steel Homes Credit Corporation, Defendants

SUPPLEMENT TO DOCKET ENTRIES, JOINT APPENDIX VOLUME I

7/11/72 Order discharging supersedeas bond as agreed to by Anderson and Reutlinger signed by Judge relieving defendant and their surety therefrom without obligation. Copies to Anderson, Middleton, Reutlinger and Mahan.

7/11/72 ORDER setting case for pre-trial conference on on September 8, 1972, at 11:10 a.m. Copies to Anderson, Hamilton, Reutlinger and Mahan.

7/26/72 ORDER regarding pre-trial conference of July 19, 1972, as follows: 1. Action shall be tried on the issue of liabilty only. 2. Exhibits previously presented to the Court, shall not be introduced to the jury during the trial of this action. 3. Counsel shall prepare and file with the Court proposed preliminary statements to be presented to the jury. 4. Counsel shall prepare and file with the Court a memorandum supporting their oral mo-

tion for a twelve man jury. Copies to Anderson, Hamilton, Reutlinger and Mahan.

8/29/72 Record received from Court of Appeals.

8/30/72 Memorandum on behalf of plaintiff, filed.

9/ 8/72 Order reflecting p/t conf. and setting case for JURY TRIAL on JANUARY 15, 1973, Pre-trial conference to be held in January, 1973. Counsel is to exchange list of specials, etc., forty-five days before trial. Copies to Anderson(Scott, Hamilton, Reutlinger and Mahan.

9/ 8/72 Proposed statement by the Court to the jury prior to trial, submitted by the defendants and filed by defendants.

12/11/72 AGREED ORDER signed by Judge Gordon that Court's pre-trial order be modified to provide that 30 days before trial the parties shall exchange a list of witnesses who may testify and produce for inspection by opposing party all exhibits that are to be placed in evidence. Copies to Anderson and Reutlinger.

12/14/72 ORDER setting case for pre-trial conference on Thursday, Jan. 4, 1973, at 3:15 p.m. Copies to Anderson, Hamilton, Reutlinger and Mahan.

12/18/72 Witnesses And Exhibits which Plaintiff May Use at the trial of this action filed by Attorneys for Plffs.

12/15/72 Witnesses list and exhibit designated filed by defts.

12/21/72 Defendants' interrogatories to plaintiff as to expectant trial testimony by expert witnesses filed.

12/21/72 Interrogatories to defendants filed by plaintiff.

1/ 4/73 Motion for a jury of twelve filed by deft. Memorandum in support of filed.

1/ 4/73 Answers to interrogatories filed by deft.

1/ 4/73 ORDER reflecting p/t conf. signed by Judge Gordon that this action be remanded from Court's trial docket of 1/15/73 and continuing for trial by JURY to WED., MARCH 14, 1973, at (9:30 a.m.) Counsel are to meet with Court in chambers at 9:00 a.m. on morning of trial. Court is advised by counsel for ptff. a motion will be filed moving the Court to allow the introduction of evidence at the trial of this action concerning defects in the prefabricated houses within 10 days fro[illegible]his date. Deft. has 10 days in which to respond thereto, at which time the motion will be taken under submission. Copies to Anderson, Hamilton, Reutlinger, Mahan and Flinn.

1/12/73 Plaintiff's answer to defendants' interrogatories filed.

1/15/73 Memorandum on behalf of the plaintiff filed.

1/15/73 Plaintiff's proposed preliminary statement to the jury filed.

1/24/73 Defendants' memorandum in opposition to plaintiff's proposals for procedures at new trial filed.

2/ 6/73 ORDER signed by Judge Gordon that motion to empanel 12 man jury to try this civil action is OVERRULED. Copies to Anderson, Hamilton, and Reutlinger and Flinn.

2/14/73 Defendants' proposed preliminary statement to the jury filed.

2/28/73 ORDER signed by Judge Gordon reflecting Court's preliminary statement to the jury at the beginning of the trial of this cause. Copies to Anderson, Hamilton, Reutlinger, Mahan, and Flinn.

Supplement to Docket Entries, Joint Appendix, Volume I

3/11/73 Marshal's return filed executed on Mr. Ralph Logan on 3/7/73.

3/13/73 Marshal's return filed executed on 3/13/73 on Mr. Robert E. Robinson.

3/16/73 ORDER signed by Judge Gordon 3/15/73 reflecting trial; citing jury impanelled; Court sustained oral motion of defts. in camera to discharge the jury. Case is continued until NOVEMBER 12, 1973, FOR TRIAL BEFORE A JURY. Copies to: Anderson, Hamilton, Reutlinger, Mahan, and Flinn.

4/10/73 TRANSCRIPT OF PROCEEDINGS of March 14, 1973, and Thursday, March 15, 1973, filed by Court Reporter.

4/10/73 Marshal's return filed unexecuted as to Stanley Mack on 4/10/73.

4/10/73 Marshal's return filed executed as to Harry R. Black on 3/13/73.

9/28/73 Interrogatories to defendants filed by plaintiff.

10/25/73 Marshal's return filed executed on Paul Semonin on 10/25/73.

10/26/73 Answers to Interrogatories filed by Reutlinger for defts.

10/29/73 Marshal's return filed executed on Charles Will, Sr., on 10/25/73; on Edwin Horn—c/o Lou. Mortgage Service Co.; on Herman Miles on 10/25/73.

10/31/73 Marshal's return filed unexecuted on Harry R. Black on 10/30/73 returned to U. S. Attorney. Witness in intensive care.

10/31/73 Marshal's return filed unexecuted on Stanley Mack check returned to attorney.

11/ 1/73 Marshal's return filed executed on Ralph Logan on 10/30/73.

Supplement to Docket Entries, Joint Appendix, Volume I

11/ 6/73 Marshal's return filed executed on Richard L. Wilson on 11/5/73. Marshal's return filed executed on Innes W. Dobbins, Jr., on 11/5/73.

11/ 8/73 Marshal's return filed executed on Edwin Horn on 11/6/73.

11/28/73 Order on hearing of 11/20/73 signed by Judge Gordon: Counsel for parties have agreed to file stipulation upon exact record on which case is to be submitted; plaintiff will file brief, proposed f/f and conclusions of law by 2/15/74; defts. will file brief, f/f and conclusions of law by 4/15/74; pff. has until 5/1/74 to respond to defts' f/f & conclusions of law at which time matter stand submitted. Copies to counsel.

11/21/73 Stipulation of record referred to in order just above filed by parties.

2/15/74 Plaintiff's tendered Findings of Fact and Conclusions of Law filed. FINDINGS OF FACT AND CONCLUSIONS OF LAW tendered.

4/15/74 Defendants' proposed findings of fact and conclusions of law filed. Certificate of Service filed.

4/30/74 AGREED ORDER signed by Judge Gordon 4/29/74 that plaintiff have through May 15, 1974, to respond to Findings and Conclusions tendered by defts. Copies to: Anderson, Hamilton, Reutlinger, Mahan and Flinn.

5/15/74 Plaintiff's Response to Defendants' So-Called "Proposed Findings of Fact and Conclusions of Law" filed.

8/13/74 Findings of Fact and Conclusions of Law by Judge Gordon on 8/9/74. Judgment to be tendered by counsel. Copies to Anderson, Hamilton, Reutlinger, Mahan, and Flinn.

9/ 5/74 Motion for award of attorneys' fees filed by plaintiff. Joint Affidavit filed. Memorandum on behalf of plaintiff concerning supplemental attorneys' fees filed. Judgment tendered.

9/11/74 Memorandum filed by defts. in response to tendered judgment of plaintiff.

9/13/74 Plaintiff's reply to defendants' memorandum filed.

9/20/74 JUDGMENT signed by Judge Gordon that the Judgment entered on 11/23/70 in favor of plaintiff, for trebled damages, attorneys' fees and costs in the sum of $427,016.75 with interest thereon at the rate of 6% per annum from 9/18/70, until paid, is in full force and effect. FURTHER ORDERED AND ADJUDGED that ptff. have judgment against the defts., U. S. Steel Corp. and U. S. Steel Homes Credit Corp. for supplemental attorneys' fees since the June, 1970, trial in the amount of $32,500.00 with interest thereon at the rate of 6% per annum from date of entry hereof. FURTHER ORDERED AND ADJUDGED that plaintiff, have judgment against the defts., U. S. Steel Corp. and U. S. Steel Homes Credit Corp. for its assessable costs incurred since Nov. 23, 1970, of $2,330.71, with interest thereon at the rate of 6% per annum from date of entry of this Judgment. Copies to: Anderson, Hamilton, and Reutlinger. This is a final judgment, there being no just cause for delay.

9/27/74 Defendant's Motion pursuant to Rule 59 of the Federal Rules of Civil Procedure filed.

10/21/74 ORDER by Judge Gordon that defts. have until 10/7/74 to prepare and submit memorandum in

support of motion pending under Rule 59, plff. have until 10/25 to respond and deft. have until 10/31/74 to reply to plf's memorandum. Thereafter, matter stands submitted. Copies to Anderson, Hamilton, Reutlinger, Mahan and Flinn.

10/23/74 Plaintiff's memorandum in response to defendant's motion pursuant to Rule 50 filed.

10/30/74 ORDER by Judge Gordon (10/29/74) that motion and alternative motions pursuant to Rule 59 and for new trial or amend judgment are DENIED. Copies to Anderson, Hamilton, Reutlinger, Mahan and Flinn.

10/31/74 Reply to Plaintiff's Memorandum on Defendant's Pending Rule 59 Motion filed.

11/ 7/74 Supersedeas Bond filed.

11/20/74 Notice of Appeal filed by defendants.

11/20/74 Request for transcript, pursuant to Rule 10 Rules of Appellate Procedure filed by defts.

11/26/74 ORDER by Judge Gordon that time to transmit the record to the Sixth Circuit is extended 30 days to and including 1/29/75. Copies to Anderson and Reutlinger.

1/28/75 Transcript of Proceedings of trial on Monday, November 12, 1973 and Nov. 16, 1973.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1194

Fortner Enterprises, Inc., - - Plaintiff-Appellee,

v.

United States Steel Corporation,
United States Steel Home Credit
Corporation, - - - - Defendants-Appellants.

Before: Miller and Kent, Circuit Judges and Cecil, Senior Circuit Judge.

JUDGMENT—Filed December 16, 1971

Appeal from the United States District Court for the Western District of Kentucky.

This Cause came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court insofar as it sustained the plaintiff's motion for a directed verdict is reversed, and the action is remanded to the district court for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act. The judgment is affirmed insofar as it denied the defendants' motion for a directed verdict.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as item-

ized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
(s) James A. Higgins
Clerk
A True Copy.
Attest:
James A. Higgins, Clerk
By (s) Grace Keller
Chief Deputy

Issued as Mandate: June 28, 1972

Costs: None
Filing fee . . . . . .$
Printing . . . . . .$

Total . . . . . .$

OPINION—Decided and Filed December 16, 1971

Before: Miller and Kent, Circuit Judges, and Cecil, Senior Circuit Judge.

Miller, Circuit Judge. This is the second appeal in this private antitrust action.[1] At the first trial the district court granted summary judgment for the defendants, holding that petitioner had failed to raise any question of fact as to a possible violation of the antitrust laws. Fortner Enterprises, Inc. v. U. S. Steel Corp., et al., 293 F. Supp. 762 (1966). The judgment was affirmed by this Court without opinion but the Supreme Court in a 5-4 decision, holding on the facts set forth in the record as it was constituted at that

[1]The action was instituted by Fortner Enterprises, Inc. against U. S. Steel Corporation and its wholly owned subsidiary, the U. S. Steel Homes Credit Corporation, pursuant to Secs. 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2, seeking treble damages and injunctive relief against further violations.

time, that summary disposition was improper and the action should go to trial, reversed the judgment of affirmance of this Court and remanded the action with directions that it proceed to trial. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495 (1969). The majority and minority opinions in this case have stimulated much general interest and wide scholarly examination.[2] Upon remand, the district judge, after a trial before a jury which occupied approximately one month, sustained the plaintiff's motion for a directed verdict and overruled the defendants' similar motion. He submitted to the jury only the question of damages which should be awarded in favor of the plaintiff. The jury returned a verdict in the amount of $93,200.00 which was trebled by the court. Motions for judgment n.o.v. and, alternatively, for a new trial were denied and judgment for the plaintiff was entered on November 23, 1970. The defendants raise no question on the present appeal as to damages, having elected to limit the appeal to the issue of liability under the Sherman Act. Their insistence is that the court erred in directing a verdict in favor of the plaintiff and that, on the contrary, the court should have sustained the defendants' motion for a directed verdict. It is argued, in the alternative, that at least the

[2]We are aware of the controversy which surrounds the tying arrangement cases generally, a controversy involving differences over both economic policy (See, e.g. Markovitz, Tie-ins, Reciprocity, and the Leverage Theory, 76 Yale L.J. 1397 (1967); Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957); and the proper application of legal doctrine (See, e.g. Kauper, The Warren Court and the Anti-trust Laws: Of Economics. Populism and Cynicism, 67 Michigan L. Rev. 325 (1968); Pearson, Tying Arrangements and Antitrust Policy, 60 NW.L.Rev. 626 (1965). We have studied with interest and special care the scholarly comments which the Supreme Court's opinions in this case have generated, finding especially useful a note: The Logic of Foreclosure: Tie-in Doctrine after Fortner v. U. S. Steel, 79 Yale L.J. 86 (1969). See also, Dam, Fortner Enterprises v. United States Steel: "Neither A Borrower, Nor a Lender Be," 1969 Supreme Court Review 1; Recent Trends in Supreme Court Antitrust Decisions: Commentary—Past, Present and Future, 38 Antitrust Law Journal 602 (1969); Note, Credit As a Tying Product, 69 Col.L.Rev. 1435 (1969); and The Supreme Court, 1968 Term, 83 Harv.L.Rev. 235.

case was one for the jury and that the action should be remanded for a new trial before a jury on the question of liability only, the damage issue already having been decided by a jury.

In its original and amended complaints the plaintiff charged that the defendants had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. Alleging that there was a continuing agreement between the defendants to force the plaintiff and other corporations and individuals, as a condition to availing themselves of the services of the Credit Corporation, to purchase at artificially high prices only U. S. Steel Homes, plaintiff specifically claimed that in order to obtain loans totaling over two million dollars from the Credit Corporation for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel Corporation on each of the lots purchased with the loan proceeds. It was further claimed that the prefabricated materials were then supplied by U. S. Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development.

To determine whether a directed verdict is appropriate the governing principle is that a verdict may properly be directed only when, without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict. Where there is conflicting evidence or insufficient evidence to make only a "one way" verdict possible, a directed verdict is improper. Brady v. Southern Railway Co., 320 U. S. 476, 479-80 (1943); 5A Moore's Federal Practice ¶50.02[1] pp. 2321, 2. An appellate court too is bound to view the evidence in the light most favorable

to the party against whom the motion for a directed verdict is made and give him the advantage of every fair and reasonable inference that the evidence may justify. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U. S. 690 (1962); 5A Moore's Federal Practice, ¶50.02[1] pp. 2226, 7.

Examining the record on the basis of these standards and in the light of the Supreme Court's opinion in this case, we find that while the plaintiff made out a prima facie case of Sherman Act violations the evidence and permissible inferences therefrom are in such conflict that neither party was entitled to a directed verdict. Instead the question of liability should have been submittd to the jury as the question of damages. Both the plaintiff and defendants to support their respective positions rely upon the Supreme Court's opinion in this case on the first appeal. In doing so they quote selective portions from the opinion which tend to indicate some support for the particular views which they espouse. It becomes necessary, therefore, in the resolution of this appeal to examine the Supreme Court's opinion to discover its real thrust and impact in the context of the facts of the present litigation as they were developed at the second trial.

At the outset it is well to bear in mind that on the first appeal the Supreme Court was not considering the alleged antitrust violations in the light of a full trial on the merits. Rather the specific question before it was a procedural one, i.e., whether it was appropriate for the district court on the basis of the facts as they had been developed from affidavits and pretrial procedures to dispose of the case by summary judgment. That the Court did not intend to indicate any view as to what the trier of the facts should find from the evidence was expressly pointed out when the Court said that it might turn out that the plaintiff's allegations will

not be sustained when the case goes to trial. "It may turn out," as the Court further stated, "that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such a conclusion as a matter of law, and it is not our function to speculate as to the ultimate findings of fact." It is also of significance that the Court indicated its reluctance to dispose of antitrust cases by summary procedure. Addressing itself specifically to the use of summary judgment procedure in antitrust cases, the Court stated: "Since summary judgment in antitrust cases is disfavored, Poller,[3] supra, the claims of uniqueness in this case should be read in the light most favorable to petitioner." (Plaintiff).

It was developed at trial that the Homes Division of U. S. Steel manufactures component parts for prefabricated houses, selling what it terms home packages in various states. The sales are made through dealer-builders such as the plaintiff. U. S. Steel's subsidiary, the Credit Corpo-

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[3]In Poller v. Columbia Broadcasting Co., Inc., et al., 368 U. S. 464, 473 (1962), the Court in stating that summary procedures should be used sparingly in complex antitrust litigation used language which we think is of significance in determining the appropriateness of directing a verdict in this case rather than submitting the issues to a jury for evaluation:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Although summary judgment and a directed verdict are procedurally distinguishable both substitute the court for the jury as the fact-finder. Some of the considerations dictating a reluctance to resort to summary judgment in complex antitrust cases are equally applicable to the direction of a verdict.

ration, was founded in 1954 as a wholly owned subsidiary for the purpose of providing financial assistance to the Homes Division's dealer-builders who were unable to obtain suitable financial assistance from more convential sources. In effect the services of the Credit Corporation were a "tool" to assist the Homes Division in the sale of its houses. Beginning in 1958 the policies of the Credit Corporation were changed, when a program of "special assistance" was initiated whereby credit was made available in high risk situations on particularly reasonable terms to Homes Division dealer-builders. As reflected by the minutes of the U. S. Steel finance committe, the purpose of the policy was to enable Homes Division "to attain a minimum of 1800 units in 1959." To reach this goal and such additional distribution as may be feasible the Credit Corporation was directed to make loans to dealers without conformity to conventional or conservative patterns "but within the bounds of prudent business judgment." It was contemplated that Homes Division would underwrite such loans, guaranteeing losses to a defined extent.

In 1959 it came to the attention of the Homes Division that certain land in an existing subdivision in the Louisville, Kentucky, area might be available for development. The land was owned by a corporation in which A. B. Fortner, a successful and well-known real estate developer, held a 50% interest. Later in that year U. S. Steel initiated discussions with Fortner with the idea that the property might be an attractive vehicle for it to enter the Louisville prefabricated housing market. Following negotiations an agreement was reached whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would become a franchised dealer-builder of the Homes Division product. It was part of the agreement that the Credit Corporation would extend credit to the plaintiff corporation for the development conditioned upon the construction on each of the 187 lots purchased by the plaintiff, a prefabricated house from the Homes Division of U. S. Steel. The initial loan was $2,055,300.00. Interest at the rate of six per cent per annum, plus a service charge of one-half of 1%, was to be charged. Of the total commitment, $373,200.00 was to cover the cost of acquisition and development of the lots; the remainder was to cover the purchase and construction of the houses. The land loan equaled 100% of the cost of the land acquisition and development.

There was evidence that the plaintiff experienced difficulties with the U. S. Steel products, including the omission of parts and the delivery of defective parts which necessitated additional work. Substantial complaints were made with respect to the Homes Division products from home owners who had purchased the homes from Fortner. Yet during this period Fortner requested additional financing for the purchase and development of land on which Homes Division houses were to be placed. Thus, on August 2, 1961, Fortner executed a land and mortgage note in the amount of $59,000.00 and a construction note in the amount of $403,400.00. Having continued to experience difficulties with the prefabricated houses and having run out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. This request was refused but Fortner was advised that he was free to refinance the Credit Corporation's loan and proceed to obtain houses from other sources. Thereafter, in July 1962 he instituted the present action.

In Northern Pacific Railway Co., et al. v. United States, 356 U. S. 1 (1958), the Supreme Court defined the tying arrangement device, identified its evils and stated the prerequisites for per se illegality in the following fashion:

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." Standard Oil Co. of California v. United States, 337 U. S. 293, 305-306. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons "tying agreements fare harshly under the laws forbidding restraints of trade." Times-Picayune Publishing Co. v. United States, 345 U. S. 594.

They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. International Salt Co. v. United States, 332 U. S. 392. Cf. United States v. Paramount Pictures, 334 U. S. 131, 156-159; United States v. Griffith, 334 U. S. 100. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour

> unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. 356 U. S. at 5, 6 and 7.

Once it is established that a tying arrangement exists, it must be determined whether a "not insubstantial" amount of commerce is affected by the tie and whether the tier has "sufficient economic power" in the market for the tying product.

We need not deal at length with whether a "tying arrangement" exists in this case, nor whether the amount of commerce affected is "not insubstantial." The Court rejected Mr. Justice Fortas' argument that this was not a "tying arrangement":

> We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional sort. 394 U. S. at 498.

On the matter of whether the volume of commerce allegedly foreclosed was "not insubstantial" the Court stated:

> The complaint and affidavits filed leave no room for doubt that the volume of commerce allegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded $190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in *International Salt, but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial."* 394 U. S. 501, 2. (Emphasis added).

The issues raised regarding the second standard, that of "sufficient economic power," is far more troublesome, but

we think that so far as the present record reflects, the issue should have gone to the jury. Of this issue, Mr. Justice Black stated that ". . . the pleadings and affidavits sufficiently disclose the *possibility* of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue." (Emphasis added.)

In other Supreme Court cases in which a "tying arrangement" has been found to be illegal per se under the Sherman Act, this question did not pose the same factual uncertainty as here. Sufficient economic power was shown in International Salt Co. v. United States, 332 U. S. 392 (1947), by the simple fact that the tying product was patented; in United States v. Loew's, Inc., 371 U. S. 38 (1962), the tying product was copyrighted; and in Northern Pacific Railway Co., et al. v. United States, 356 U. S. 1 (1958), it was the physical uniqueness of the land which constituted the tying product.

Here no such talisman exists. The Court rejected Fortner's "apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual'." Having done so, however, the Court refused to specify precisely what proof would satisfy the standard of the per se rule. Yet the Court was not entirely silent as to the sort of proof which could be weighed in determining the existence of the necessary "economic power" in the tying product.

Under the antitrust statutes, the tying cases are fundamentally based on the notion that competitive advantage in one market (that of the tying product), whether the result of a patent, copyright, physical uniqueness, a cost advantage or whatever else might serve as a source of leverage, should not be translated into a competitive advantage in another distinct market (that of the tied product).

The focus of our present inquiry is whether the Credit Corporation possessed leverage in the credit market (the "tie" here being extension of credit) sufficient to induce

buyers in the market for prefabricated houses (the "tied" product) to accept a less competitive product.

It is clear that such leverage need not be of sufficient magnitude to constitute monopoly power or even market dominance. As stated in the majority opinion in this case:

> The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistabably clear that the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market. See, e. g., International Salt; Northern Pacific; United States v. Loew's Inc., 371 U. S. 38 (1962). 394 U. S. at 502, 3.

And in United States v. Loew's Inc., 371 U. S. 38 (1962), the Court stated:

> . . . Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes. 371 U. S. at 45.

As we have pointed out, the Court expressly rejected Fortner's "apparent" argument that the uniqueness of the loan, namely the fact that one hundred per cent land financing may have been unavailable elsewhere in Louisville at the time the loan commitment was made, alone constitutes proof of "sufficient economic power." It was apparently the view of the Court that, while plaintiff need not prove dominance in the credit market on the part of the Credit Corporation, it must prove that the "unique and unusual" terms offered by the Credit Corporation reflected some

unique economic advantage over its competitors. The Court pointed to two possible sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. The Court did not preclude the possibility of other sources of leverage.

Turning to the evidence with respect to these two possible sources of economic power suggested by the Supreme Court, judicial notice may be taken of the fact that national banks may make loans only on improved real estate, and that federally insured savings and loan associations are limited to loans up to 70% of the real estate as developed. Yet the record appears to be barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, and insurance companies. A jury should be permitted to evaluate the significance of the freedom of such traditional lending sources from any restriction against extending 100% financing in deciding whether competitors in the Louisville credit market were precluded from offering credit on such terms. On the same facet of the case there was testimony at trial that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis. Such fact, while not conclusive of the situation as it existed at the time plaintiff's loans were consummated, could be appropriately considered by a jury in reaching the ultimate conclusion whether the Credit Corporation had economic power in the credit market so as to come within the per se rule. Further, while the plaintiff offered some evidence that 100% financing was not generally available on the Louisville market at the time of its financing with the Credit Corporation, it must be conceded that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors, as appropriately pointed out by the defendants, include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment. Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be sufficient to establish the fact that it is unable to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower.

As to the second factor suggested by the majority opinion, (that of a possible cost advantage) we again find that the record is open to varying interpretations, inferences and conclusions. It is true that the Credit Corporation as a wholly owned subsidiary of U. S. Steel was able to obtain funds for lending purposes at the prime rate, and that U. S. Steel necessarily stood behind repayment of any funds which the Credit Corporation was required to borrow. Also, as a subsidiary of U. S. Steel, it may be inferred that the Credit Corporation was not expected to maximize profits but to assist in the sales of the Homes Division houses. During the relevant period no dividends were paid to the parent corporation and there is no evidence that the Credit Corporation competed aggressively as a lender. These considerations could conceivably be taken by a jury as some evidence that the Credit Corporation was able to make loans at a level of risk unacceptable to most lending institutions. On the other hand, the record justified the conclusion that the Credit Corporation, while not operating at a loss, had comparatively low profits. Its total not profits in 1960 and 1961 were $52,197.00 and $59,053.00, re-

spectively. In those same years its earnings in relation to net worth were 4.5% and 4.8%. At least two local mortgage companies in Louisville had higher earnings in relation to net worth in both of these years. There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation. Of course, the Credit Corporation, as the evidence demonstrated, incurs the usual operating costs of a lending institution, including clerical and management salaries, rent, charges for office equipment, supplies, services, taxes, etc. Moreover, it would be relevant for the jury to take into account that the Credit Corporation operates at some disadvantage in that traditional lending agencies doing business in a community on a continuing basis serve a concentrated geographic area having a large and more diversified clientele of borrowers permitting them to achieve cost savings and efficiencies not available to a lender engaged in a business like that of the credit Corporation. It is also possibly true that traditional lending institutions are in position to spread their risks and costs both over a larger volume of business and over different areas of the economy.

The Credit Corporation obtained its funds primarily from banks. In 1961 it had borrowed from banks approximately ten to fourteen million dollars. For the borrowing of these funds it paid the prime rate. On the funds which it borrowed from U. S. Steel it paid the prime rate plus one per cent. It may be that the jury could infer from the record that the Credit Corporation incurred higher costs in acquiring money to lend than the costs incurred by commercial banks, savings and loan associations and insurance companies. In this connection it must be remembered that we are here dealing not with advantages which a finance subsidiary may give to its parent in relation to competitors in the parent's line of business, but with the question

whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.

Plaintiff also points to the fact that the Homes Division guaranteed or underwrote the land financing extended to plaintiff and certain others. It is argued that this fact demonstrates economic power over credit. This conclusion, in our view, is not necessarily true. On the contrary, it may simply be a factor which demonstrates that it was necessary for the Credit Corporation to be subsidized against any loss incident to the greater cost and risk involved. Doubtless other lending institutions in the relevant market were of sufficient strength and soundness to inspire confidence in their loan commitments.

Plaintiff's reference to the Supreme Court majority's statement in regard to the Homes Division houses being priced some $400.00 higher than comparable houses would not appear to have any conclusive effect on the question which we are now considering. It is clear from the opinion that Mr. Justice Black and those justices who joined him in the majority opinion did not reach any definitive conclusion as to the effect of this factor. On the contrary, as pointed out, they merely said that a substantial price differential "may suggest" or is not inconsistent with the "possibility of market power." The evidence on this question should be weighed by the jury and its proper probative value determined.

While the plaintiff claims a violation of Sec. 2 of the Sherman Antitrust Act, we do not deem it necessary to discuss the evidence on this question since it consists substantially of the same evidence offered in support of the alleged Sec. 1 violation. We are satisfied that the total evidence, measured in terms of the principles enunciated by the majority opinion of the Supreme Court on the first appeal, make it inappropriate for the Court to approve a directed

verdict for either party in this case on the liability issues under Secs. 1 and 2 of the Sherman Act.

In Advance Business Systems & Supplies Co. v. SCM Corporation 415 F. 2d 55 (4th Cir. 1969), cert. denied 397 U. S. 920 (1970), the Court, as the plaintiff argues, interpreted Fortner as holding that ". . . the 'sufficient economic power' test of per se illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in with respect to any appreciable number of buyers within the market'." Plaintiff in its brief relies upon this interpretation and insists that the directed verdict in its favor was justified on the basis of this interpretation of Fortner by the Fourth Circuit. As we read the majority opinion in Fortner, the holding was that a tying arrangement achieves an unlawful restraint when "the seller can exert some power over some of the buyers in the market." The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power. If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion.

The judgment of the district court insofar as it sustained the plaintiff's motion for a directed verdict is accordingly reversed, and the action is remanded to the district court for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act. The judgment is affirmed in sofar as it denied the defendants' motion for a directed verdict.[4]

[4]We have not undertaken in this opinion to discuss all of the items of evidence bearing upon the question of economic power. Plaintiff relies heavily, for example, upon evidence tending to indicate that the

(Footnote continued on following page)

UNITED STATES DISTRICT COURT

Western District of Kentucky
At Louisville

Fortner Enterprises, Inc.

vs.

United States Steel Corporation
United States Steel Home Credit Corp.

} Civil Action No. 4392

ORDER—Entered Nov. 28, 1973

On November 20, 1973, this case was called in open court for a continuation of the trial before the Court. There appeared Hon. Kenneth L. Anderson and Hon. A. Scott Hamilton, Jr. for the plaintiff and Hon. Albert F. Reutlinger, Hon. Armer H. Mahan, and Hon. Macdonald Flinn for the defendants.

Counsel for the parties having agreed to file a Stipulation upon the exact record on which the case is submitted, and the Court being fully advised,

Credit Corporation was both able and willing to lend to high risk borrowers at a rate of interest commensurate with a much lower level of risk, i.e., to offer credit on terms otherwise unavailable at the time. The guarantees and the Credit Corporation's relationship to U. S. Steel are pointed to as possible sources of leverage. Upon remand, these items and the entire range of evidence bearing upon this issue should be submitted to the jury. Insofar as the complaints allege a per se violation due to a tie-in, assuming that the evidence developed is substantially the same as that offered at the first trial, the trial judge may appropriately instruct the jury that the tie-in itself has been established as a matter of law, and that the amount of commerce affected is "not insubstantial." On this aspect of the case, the issue for the jury is whether the Credit Corporation, in the language of Northern Pacific Railway Co., et al. v. United States, supra, had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." Admittedly this is a standard which must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence, (some of which we have commented upon) free from the limitations of an arbitrary definition.

Order

It Is Ordered that the plaintiff will file its brief, proposed findings of fact and conclusions of law by February 15, 1974; the defendants will file any brief, proposed findings of fact and conclusions of law by April 15, 1974, and the plaintiff will file any response to defendants' proposed findings and conclusions by May 1, 1974, at which time the matter stands submitted.

(s) James F. Gordon
United States District Judge

Copies to
Counsel of Record

STIPULATION

The parties hereto, by counsel, agree that the plaintiff will supplement the Trial Record herein by including from the Dyas deposition material found on Page 92, Line 18 to Page 93, Line 3, which shall be deemed admitted.

And the parties, by counsel, stipulate that the defendants will supplement their proof herein by including the following material, which shall be deemed admitted:

1. A. B. Fortner deposition, April 22, 1970:
    1. P. 43, q. 230 through p. 44, q. 233.
    2. P. 59, q. 313 through p. 60, q. 313.
2. A. B. Fortner affidavits, pp. 289a through 294a, Supreme Court Joint Appendix.
3. William Lang deposition, April 21, 1964:
    1. P. 15, line through p. 17, line 11.
4. Richard C. Dyas deposition, April 21, 1964:
    1. P. 99, line 23 through page 101, line 7.
    2. P. 105, line 19 through p. 109, line 7.
    3. P. 121, line 19 through p. 125, line 24.

Stipulation

5. Plaintiff's Answers to Defendants' Interrogatories, 3(a) and 4(d), February 14, 1964.

6. Plaintiff's Answers to Defendants' Interrogatories, January 2, 1973, and letter from Mr. Anderson to Mr. Reutlinger enlarging upon same, November 9, 1973.

Xerox copies of all this material are attached to this Memorandum.

/s/ Kenneth L. Anderson
Attorney for Plaintiff

/s/ Albert F. Reutlinger
Attorney for Defendants

DEPOSITION OF RICHARD C. DYAS

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RICHARD C. DYAS, having been duly sworn by the Notary Public, was examined and testified as follows:

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Q. What company or companies do you work for?

A. I am employed by the United States Steel Corporation and I am assigned to the U. S. Steel Homes Credit Corporation. My employer is United States Steel Corporation.

Q. Do you receive your compensation on checks written through United States Steel Corporation bank accounts, or through accounts held by U. S. Steel Homes

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Credit Corporation?

A. United States Steel bank accounts.

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DEPOSITION OF A. B. FORTNER, JR.

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230. How long had you been in the Real Estate business?

A. Up to date?

231. Yes.

A. Thirty years.

232. Anything that is overpriced won't sell anyhow, will it?

A. Not generally, not too fast, but these were underpriced and they admitted it when they came out to the opening, they said it was a wonderful opening and at these low prices the houses should sell very fast and they did for a while.

233. You could have charged more for the houses without being non-competitive in the general market?

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A. Yes, I think we could have raised our prices a little bit. We wanted the subdivision to move fast.

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313. All right. Changing the subject, Mr. Fortner, and going back to the first discussion earlier today when I asked you to recount as best you could from memory the stages of the negotiations, discussions and so forth leading up to the first contract which was executed in the summer, August of 1960, have you told me, as best you recall, all of the discussions, what was said and the changes made in the negotiations as they went along?

A. There was one meeting that came to my

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mind and that's the meeting where Zettwoch-Fortner sales force was invited over to their plant and I believe this was

the Spring of '60, possibly. We were invited over there and at that time we were shown pictures and movies and folders and models, existing models that was up and generally told how quick and how easily the houses went together and their models spoke for theirselves, which was real attractive and we went all through that as a sales pitch of just how much time we could save by erecting U. S. Steel Homes.

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AFFIDAVIT OF A. B. FORTNER, JR.

Comes the affiant, A. B. Fortner, Jr., and states that he is and has been for a period of time prior to 1959 the President of the Plaintiff, Fortner Enterprises, Inc. Affiant states that during that same period of time he also has been President of Zettwoch-Fortner, Inc., a real estate company doing its principal business in Louisville and Jefferson County, Kentucky. Affiant states that he has been engaged personally, or as an officer of a company or companies, in the real estate business for many years in Louisville and Jefferson County, Kentucky.

Affiant states that he had available in 1959, through another corporation in which he owned an interest, certain land in Jefferson County, Kentucky suitable for subdivision purposes. Affiant states that he was contacted by representatives of U. S. Steel Corporation's Homes Division during 1959 concerning the building of prefabricated homes manufatcured by that company on said land. At that time affiant was told that very attractive financing was available from U. S. Steel Homes Credit Corporation. Affiant, as President of Fortner Enterprises, Inc., was then approached by representatives of the Credit Corporation offering substantial financial assisatnce for the purchase and development of the land in question and the construc-

tion of dwellings thereon provided that prefabricated homes manufactured by the Homes Division would be built on said land.

Affiant states that the ultimate offer of the Credit Corporation was to provide 100% financing for the purchase and development of the land in question. Affiant states that to his knowledge no such financial assistance was available to Fortner Enterprises, Inc. in 1959-1962 on the terms offered by the Credit Corporation from any other source. The offered financial assistance, particularly in terms of the 100% financing feature, was so unusual, unique as far as the Plaintiff was concerned, and attractive that the Plaintiff because of economic circumstances accepted the assistance offered, including conditions imposed by the Credit Corporation that prefabricated homes manufactured by the Homes Division would be built in the subdivision.

Affiant states that presentations made by the Homes Division as to the speed of erection and quality of the prefabricated home package made said product attractive to the Plaintiff, but that the Plaintiff would not have purchased said home packages but for the financial assistance offered by the Credit Corporation.

Due to the nature of the financial assistance offered, affiant signed the loan agreement dated November 28, 1960, which is an exhibit with the Complaint, and the Plaintiff subsequently entered into the development of the land and the building of U. S. Steel homes on the lots in said division.

Prior to the time that affiant and Fortner Enterprises, Inc. became aware of the extent of the defective nature of the prefabricated homes and other problems caused by shortages in the home packages and delays in delivery of said packages, the Plaintiff applied for further financial assistance to obtain 32 additional lots which became available in said subdivision and to obtain additional working capital.

Subsequently, affiant became aware of the extent of the defects in construction or design of certain elements of the prefabricated home packages and other problems created by the Homes Division, and of the tremendous number of complaints from home purchasers and of the bad reputation of said subdivision insofar as the quality of the homes was concerned. Being aware of the fact that he was contractually obligated in the loan agreement with the Credit Corporation to build the prefabricated homes of the Homes Division on the lots in the subdivision, affiant approached Mr. Dyas and others from the Credit Corporation in the latter part of 1961 or the early part of 1962 seeking to build conventional or other homes in said subdivision. This request was refused and affiant was told that Plaintiff would be required to abide by the terms of the contract.

Problems with the prefabricated home packages continued. More and more defective sink tops were discovered. Closet door problems multiplied. Many other problems with components developed. Delays in delivery of the home packages continued and shortages in the packages when delivered continued. Complaints from home purchasers increased. The reputation concerning the quality of the homes being built became worse.

Affiant, as President of the Plaintiff company ultimately had a meeting with representatives of the Credit Corporation and the Homes Division in the offices of affiant's counsel, A. Scott Hamilton, on or about June 5, 1962, at which time the Plaintiff formally requested the Credit Corporation to allow it to build conventional or other homes in the subdivision. This request was forcefully refused by Mr. Dyas, the representative of the Credit Corporation. Affiant's Affidavit concerning that conference is already a part of the record in this case and a copy is attached hereto.

/s/ A. B. Fortner, Jr.

AFFIDAVIT OF A. B. FORTNER, JR.

Affiant, A. B. Fortner, Jr., after being duly sworn, deposes and states he is President of Fortner Enterprises, Inc., the plaintiff in the pending action of Fortner Enterprises, Inc. vs. United States Steel Corporation et al; that prior to the filing of said action, this affiant through his attorneys, Hamilton, Hopson & Hamilton, arranged a conference with certain officials of U.S. Steel Homes Division of United States Steel Corporation and the U.S. Steel Homes Credit Corporation in the offices of Hamilton, Hopson & Hamilton, 1015 Kentucky Home Life Building, Louisville, Kentucky; that said conference was held on the 31st day of May, 1962, and that there were present at said conference Mr. Dyas and Mr. Rollins, representing the U.S. Steel Homes Credit Corporation, Mr. Black, Mr. Mack and Mr. Boyd representing the United States Steel Homes Division of United States Steel Corporation, together with their attorney Albert F. Reutlinger. This affiant was present together with his attorneys, Henry D. Hopson and A. Scott Hamilton, Jr., representing Fortner Enterprises, Inc. Also present was Mr. Miles, the general contractor who had done considerable work in the Golden Meadows Subdivision, and Mr. Earl Smith, one of the principal salesmen handling sales of the houses in the subdivision. This conference was arranged in an effort to work out an amicable solution to the problems that were caused by the defective condition of the homes being furnished by the United States Steel Homes Division of the United States Steel Corporation. The persons who had purchased these homes were registering innumerable complaints about defective parts and the defective conditions of the homes that appeared subsequent to their taking occupancy. The dissatisfaction with these homes caused the reputation of this subdivision to deteriorate to the point that further sale of

the homes furnished by the United States Steel Homes Division of the United States Steel Corporation became practically impossible. With this condition prevailing, it became apparent that Fortner Enterprises, Inc. could not continue to construct the homes furnished by the United States Steel Homes Division of the United States Steel Corporation as it was required to do under the loan agreement. These facts were fully explained to Mr. Dyas and the other gentlemen present, and our problem was fully explored with them. They were advised by Fortner Enterprises, Inc. that the project could yet be made a success and their loan completely repaid if they would delete from the loan agreement the requirement that it was necessary to erect on each lot a prefabricated dwelling house manufactured by the United States Steel Homes Division of the United States Steel Corporation and allow Fortner Enterprises, Inc. to construct conventional homes on said lots. Mr. Dyas replied in substance as follows:

> I don't care about the component parts being furnished you by U.S. Steel Homes Division United States Steel Corporation, good, bad or indifferent. That is out of my department. Fortner Enterprises made an agreement with my company. It has an obligation to meet under this loan agreement, and I intend to see that Fortner Enterprises fulfills every obligation set forth in that agreement. United States Steel Homes Credit Corporation is not in the business of financing houses for other companies or businesses. Your little show does not impress me one bit.

With this rejoinder Mr. Dyas got up and left the office.

/s/ A. B. Fortner, Jr.

DEPOSITION OF WILLIAM LANG

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Q. Mr. Lang, when the Homes Division has a customer interested in obtaining financing, what procedure is followed as between the Homes Division of United States Steel Corporation and the Credit Corporation in obtaining activity by the Credit Corporation with respect to the financing.

Mr. Reutlinger: I presume your question is generally, and not in this specific case?

Mr. Anderson: Not in this specific case; I am just asking for general procedure.

A. Once the Homes Division makes its determination that this is a desirable dealer, and finances, or intends to finance that dealer, based on whatever their criteria are, and if that dealer is not able to arrange financing, or doesn't possess financing itself, then the Homes Division will ask us, the Credit Corporation, if we'll see what we can do to aid this customer's financing problems.

Q. What procedure is then followed? Do you have someone from the Credit Corporation contact the customer?

A. That's right.

Q. And then I take it negotiations are entered into with the customer concerning his financing needs?

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A. Well, first, before you negotiate, you have to understand what they are and what the needs are. And whether you can do them or not do them, depends on many, many things, and they are different on each occasion, different factors.

Q. You obtain your background information first, and evaluate it, and then enter into negotiations; would that be a fair statement?

A. Yes.

Mr. Buchanan: Could I interrupt here and make sure that Mr. Lang knows what you mean by "enter into negotiations"? I am not sure that I know what you mean by it.

Mr. Anderson: I think he understood the question. If he didn't, he could have asked me. You are not testifying, Mr. Buchanan. Mr. Lang is.

Mr. Reutlinger: He is asking for his own information.

Mr. Buchanan: I am just trying to clarify it.

The Witness: Will you please define what you mean by negotiations?

Q. Negotiations in the context in which I used the word, involve the give and take with a particular

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customer concerning his needs and the Credit Corporation's willingness to make a counter-proposition, or work out some arrangements with the potential customer.

A. Yes.

Q. I assume that is approximately what you understood the word to mean in this context; is that correct?

A. Yes. Negotiations are the analysis of the problem and the ability to find a solution which is mutually satisfactory, if that's possible.

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DEPOSITION OF RICHARD C. DYAS

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Q. Tell us generally the procedure followed whereby the Credit Corporation becomes involved in a transaction with a customer of the Homes Division.

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A. First, contact is made by the Homes Division, a representative of the Homes Division—it could be the

president, it could be the sales manager, it could be a salesman—who will informally discuss with us an application made by a dealer for a certain type of financial assistance, and there are different types, many different types.

On the basis of that discussion, quite often, we turn down the request. Perhaps we might say there is no use pursuing this because it is not the sort of thing that we feel we ought to do, or can do, or should prudently do. Or we might say, well, we'll be happy to negotiate with the dealer.

In that event, depending upon the location, we may go with the representative of the Homes Division to the dealer's establishment, or the Homes Division representative may bring him into our office. And we sit down and discuss the situation and conduct normal negotiations in a financial transaction.

Sometimes they are fruitful, sometimes they are not. Sometimes we do what the dealer would like us to do, sometimes we will do half of what he would like us to do, and then we won't do it at all.

We wind up with an agreement in which the dealer,

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in effect, offers to make a loan from us, and we agree to grant it to him.

Q. With regard to the transaction with Fortner Enterprises, which is of course the subject matter of this litigation, did that take substantially the form which you have described in your previous answer?

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Q. Mr. Dyas, have there been many or few loans made by the Credit Corporation which the Credit Corporation did not consider to be financially sound risks, using business and financial principles and judgment?

Mr. Reutlinger: I will let the witness answer, but the words "many or few" are quite

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broad. Would you want to ask him about numbers of percentage? What I think is a few and what you think is a few might be different.

Mr. Anderson: We will ask him to explain his answer.

A. Well, you say sound principles. If a loan were a bankable loan, we wouldn't have an application at all, in all likelihood. Of if we did, we'd refer the dealer to the bank.

So that from a strictly banking standpoint, you can't say that any of our loans are made on strictly sound banking principles, none. They are made to provide working capital to people who don't have working capital. And the fact that they don't have it pretty well indicates that they are not prime financial risks.

So I'd say that most loans we make are not bankable loans, are not made on sound banking principles.

Q. Are you familiar with the underwriting agreement entered into between the Homes Division and Credit Corporation on March 30, 1962?

A. Yes.

Q. There is attached to that list of companies which are the subject matter of that under-

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writing agreement.

As of the date of that agreement, were these most of the companies with outstanding loans from Credit Corporation?

A. You say did these companies have loans?

Q. Do they represent most of the companies that had loans?

A. I can't answer that, I don't know. It looks like quite a list. I'd have to compare it with the full list to know whether it was most or less than most. I don't know.

Just looking at a list, I can't compare it as to whether it's most loans we made or not. I don't know.

Is there a total on it?

Mr. Reutlinger: No. There is no total as regards the outstanding commitment.

The Witness: I can't answer that without reference to records.

Q. What was the purpose of entering into this underwriting agreement between Homes Division and Credit Corporation?

A. Well, the main purpose is this: Competition in the building industry has required the acceptance by

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lumberyards, brick factories, prefabricators and others, of longer and longer risks.

We reached a point in the Credit Corporation some time ago that in order to compete we found—that is, in order for the Homes Division to compete—we found that it was necessary to take risks which had to be classified as commercial rather than banking risks.

And in those cases, then, we require the Homes Division to underwrite that risk as a commercial risk in the promotion of its business.

Q. These particular types of transactions that you have just described are transactions entered into by Credit Corporation in order to gain or retain a substantial entry into a particular market area surrounding the location of the subdivision or subdivisions in question; would that be correct?

A. Well, the motivation comes from the Homes Division. They may want to open a new territory, they may want to increase sales in a particular territory, they make the determination. We don't.

Q. The negotiations which were entered into between Credit Corporation and Fortner Enterprises in late 1959

were entered into with the purpose of obtaining

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or expanding the Homes Division's market area in Louisville and Jefferson County, generally that area, would that be correct?

A. I can't answer that. I expect that's true, I except that they wanted to do business in Louisville. But we didn't make that decision.

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Q. Would you explain the conception of a collateral note, please?

A. That is our means of protecting ourselves against violations by dealers of their representations and agreements to use the loan proceeds for the purposes for which they solicited them.

It is possible, when we make a loan, for instance,

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to develop a group of lots into salable form, for a dealer at that point, having developed them with the proceeds of our loan, to put them on the market, take a profit at the enhanced value of the property. That is possible.

In that event, we have always felt that we should be entitled to something more than simple interest on a loan which has not fulfilled its purpose. We felt that in an event like that, it's reasonable to expect that we would get some compensation commensurate with the risk involved in that sort of financing, without the increased benefit of the sales of our product.

That is the basic reason for it.

I just have to explain, we are not in the land financing business, that is not our business. If it were, we would operate in some other way.

But when a man uses our facilities, or intends to use them, simply as a convenience to himself, to make a profit

in land development and speculation, we feel we are entitled to some additional compensation. We can't protect ourselves any other way, that we have ever devised.

Q. I believe your transactions, such as this

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one, bear six percent interest on the principal of the land note and the construction note; is that right?

A. That's right.

Q. And there is also a one half of one percent charge in addition?

A. Sometimes; usually, yes.

Q. Again, we assume that this document is an accurate copy of one of the loan agreements entered into between Fortner Enterprises and the Credit Corporation.

I believe on page two, paragrapth 2H, this particular document does provide for the one-half of one percent—

A. It apparently does, this document. Yes.

Q. How is the amount of the collateral note generally computed, and how was it computed specifically in this particular loan agreement of August 2, 1961?

A. Well, on this particular agreement, it was five percent of the amount of the land loan.

Q. Is five percent generally the figure which the Credit Corporation uses, or does that vary?

A. It varies, but I would say it generally is true.

Q. During the period 1958 through 1962, were there land and construction loans made in which a

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collateral note was not involved?

A. I can't answer that. Yes, I can answer it, too. Many times it was not involved.

Q. Were there factors which distinguish the transactions in which the collateral note was not involved from transactions such as this one?

A. Yes, there are. The distinguishing factors consisted primarily of our previous experience with the borrower.

We have dealers—the Homes Division—who have been dealing with us, the Credit Corporation, over many years. We have great confidence in them. We know their ability, we know what they have done, we know what they can do, and what they will do; it's a matter of an established relationship.

On any new dealer who we don't know, who could conceivably be using us as a convenient financing device, with no real intention of complying with his agreement, particularly one with no experience—assuming such a case—of very little experience in building, and certainly not a professional home builder, we look upon with some suspicion, and in those cases, customarily, we would require such a note.

But we don't with established customers in whom we have confidence.

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Q. Your conception of the use of this collateral note is applicable to a situation where a dealer might borrow money from the Credit Corporation to develop land, and then sell the lots individually to others; or equally applicable to a situation where he might borrow the money from the Credit Corporation, use it to develop the land then refinance the project; would that be correct?

A. Yes, naturally.

Q. And is this collateral note designed to, as you have termed it, protect the Credit Corporation in either one of these events?

A. Yes, it is designed to provide us additional compensation if the purpose of the loan is not fulfilled.

Q. And the purpose of the loan is to see that homes manufactured by Homes Division are built in the entire subdivision?

A. The purpose of the loan is to provide the dealer the capital for the purpose for which he applied for the

loan. Where the dealer comes to us and applies for a loan for the purpose of building United States Steel homes, we consider that a binding contract.

ANSWER TO INTERROGATORIES

(Q. 3) With regard to the allegations found in Paragraph 15 of the complaint:

(a) List by lot number and street number the 70 houses allegedly constructed of faulty and defective material and give the date of purchase by plaintiff of material from United States Steel Corporation for each home and the date of delivery of such material to plaintiff for each home.

(A. 3a)

Lot No.	Street No.	Date of Purchase of Material	Date of Delivery of Material	Name of purchaser
70	10702 Leelah Court	5-26-61	6-20-61	Elroy Farris
212	10801 Jacqueline Way	1-19-62	3- 2-62	Robert L. Melton
211	10803 Jacqueline Way	10-27-61	11-14-61	Chester A. Page
215	10804 Jacqueline Way	9-11-61	9-26-61	Carl H. Neville
210	10805 Jacqueline Way	5-28-61	7-20-61	Charles L. Mitchell
208	10809 Jacqueline Way	6-21-61	7-24-61	Geo. A. Austin
389	10810 Jacqueline Way	4- 4-62	4-26-62	Donald Nierengarten
391	10900 Jacqueline Way	10-27-61	12- 7-61	Dallas Ballou
190	10707 Golden Drive	10- 3-61	10-10-61	Edwin V. Wright
189	10709 Golden Drive	10-29-61	11- 3-61	Clarence Chesser
188	10711 Golden Drive	5-29-61	7-14-61	Harold E. Poole
187	10713 Golden Drive	10-27-61	11-20-61	Jerome Hauck
186	10801 Golden Drive	10-10-61	10-24-61	Jack B. Johnson
195	10801 Golden Drive	1- 4-62	1-29-62	James Ray
196	10804 Golden Drive	1- 4-62	2- 5-62	Larry L. Keys
182	10809 Golden Drive	9-27-61	10- 5-61	J. E. Chasteen
202	10818 Golden Drive	10-27-61	11- 9-61	Carl L. Hasken
176	10821 Golden Drive	10-27-61	11- 8-61	Charles Waller
79	10706 Milwaukee Way	6-16-61	8- 8-61	Ronald Woprice
80	10708 Milwaukee Way	9-11-61	10- 5-61	Stephen N. Massie
81	10710 Milwaukee Way	5-15-62	5-24-62	Maurice Goldsmith
82	10712 Milwaukee Way	1- 4-62	2-14-62	Merle E. Stepp
83	10714 Milwaukee Way	2-20-62	3-31-62	Harles Hampton
84	10800 Milwaukee Way	4-30-62	5- 4-62	James C. Fort
410	10805 Milwaukee Way	5-16-61	5-18-62	Ernest R. Walker

Lot No.	Street No.	Date of Purchase of Material	Date of Delivery of Material	Name of purchaser
50	5104 Constance Drive	4-12-61	4-21-61	James E. Marquess
20	5107 Constance Drive	1-16-61	2-21-61	Jesse A. Blay
19	5105 Constance Drive	1-16-61	2-20-61	Joseph R. Denzik
104	10912 Milwaukee Way	5-15-61	5-26-61	Chestonia Riggs
336	10800 Beatrice Way	4-26-61	5-16-61	Paul W. Moates
52	5108 Constance Drive	5-29-61	6-16-61	James B. Tucker
51	5106 Constance Drive	5-15-61	6- 1-61	Herbert E. Gordon
66	10710 Leelah Court	5-15-61	5-22-61	Donald Mitchell
69	10704 Leelah Court	5-10-61	5-19-61	John K. Nichols
323	10809 Beatrice Way	5-10-61	6-23-61	Capt. C. Cummings
65	10712 Leelah Court	6- 1-61	6-22-61	R.L. Hagerman
57	10702 Leelah Court	1-16-61	4-14-61	Darrell Adams
363	10712 Emma Jean Way	5-10-61	6- 9-61	Olin F. Brookins
59	10707 Leelah Court	6-16-61	6-28-61	James B. Rozier
58	10705 Leelah Court	1-16-61	4-20-61	Pete Waclowsky
62	10713 Leelah Court	7- 3-61	7-25-61	Earl C. Craddock
63	10715 Leelah Court	5-26-61	6-14-61	James Hodges
367	10804 Emma Jean Way	6-27-61	7-13-61	G.W. Ramsey
319	10803 Beatrice Way	5-10-61	5-29-61	Charles R. Crawley
67	10708 Leelah Court	7- 5-61	7-27-61	Wm. R. Jansen
21	5109 Constance Drive	1-16-61	3-19-61	James M. Schlangen
307	10809 Marcitus Road	6-27-61	7- 7-61	John P. Collins
60	10709 Leelah Court	7-20-61	8- 4-61	Vernon Hornbach
305	10805 Marcitus Road	7-10-61	8- 3-61	E.P. Monroe, Jr.
710	10901 Dearing Road	9-11-61	9-20-61	Paul Beavin
64	10714 Leelah Court	8-29-61	8-31-61	Charles Cranmer
68	70706 Leelah Court	9-11-61	9-25-61	Newton C. Stucker
61	10711 Leelah Court	9- 5-61	9-15-61	Jack W. Hays
28	5205 Constance Drive	1-16-61	2-24-61	Heinz Koenig
71	5200 Constance Drive	11-14-60	11-25-60	E. W. Sims
27	5203 Constance Drive	11-21-60	1- 6-61	James G. Edster
26	5201 Constance Drive	11-21-60	12-30-60	John Cunningham
56	5116 Constance Drive	11-14-60	11-22-60	Jimmie Wood
217	10808 Jacqueline Way	3- 1-62	3-16-62	Thomas D. Marquess
209	10807 Jacqueline Way	10-24-61	10-27-61	Jacob D. Hooks
25	5117 Constance Drive	8-18-61	8-25-61	B. G. Huddleston
72	5206 Constance Drive	11-14-60	11-30-60	W. J. Lish
48	5016 Constance Drive	10- 3-61	10-26-61	Plaintiff
192	10703 Jacqueline Way	10- 3-61	10-13-61	Plaintiff
78	10704 Jacqueline Way	2- 2-62	2-14-62	Plaintiff
185	10803 Golden Drive	10-27-61	11- 7-61	Plaintiff
477	10907 Golden Drive	10-10-61	10-31-61	Plaintiff
412	10801 Milwaukee Way	10-27-61	11-21-61	Plaintiff
478	10909 Golden Drive	10-10-61	10-31-61	Plaintiff
49	5100 Constance Drive	10-29-61	12-27-61	Plaintiff

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Answer to Interrogatories

(Q. 4d) Give the date construction was commenced, and the date construction was completed as to each of the 70 homes.

(A. 4d) The date construction was commenced and the date construction was completed as to each of the 70 homes are as follows:

Lot No.	Date Construction Commenced	Date Construction Completed	
70	6-21-61	8-22-61	
212	3- 3-62	6- 4-62	
211	11-15-61	3-28-62	
215	9-27-61	12- 1-61	
210	7-21-61	10- 2-61	
208	7-25-61	10- 2-61	
389	4-27-62	6-28-62	
391	12- 8-61	4-16-62	
190	10-11-61	12-13-61	
189	11- 4-61	1-26-62	
188	7-15-61	10- 5-61	
187	11-21-61	2-26-62	
186	10-25-61	2-23-62	
195	1-30-62	4-26-62	
196	2- 6-62	5-11-62	
182	10- 6-61	12-18-61	
202	11-10-61	3-10-62	(7-13-62)
176	11- 9-61	4-16-62	
79	8- 9-61	10- 3-61	
80	10- 6-61	12-18-61	
81	5-25-62	8-13-62	
82	2-15-62	5-25-62	
83	4- 1-62	5-28-62	
84	5- 5-62	7-25-62	
410	5-19-62	8- 1-62	
50	4-22-61	6- 8-62	
20	2-22-61	6-16-61	
19	2-21-61	5-26-61	closed July, 1961
104	5-27-61	7-18-61	
336	5-17-61	7-31-61	
52	6-17-61	8- 4-61	

Answer to Interrogatories

Lot No.	Date Construction Commenced	Date Construction Completed	
51	6- 2-61	8-21-61	
66	5-23-61	8-16-61	
323	6-24-61	9-21-61	
65	6-23-61	9- 5-61	
57	4-15-61	6-16-61	
363	6-10-61	9- 1-61	
59	6-29-61	9-20-61	
58	4-21-61	6-19-61	
62	7-26-61	9-15-61	
63	6-15-61	8-25-61	
367	7-14-61	10- 8-61	
319	5-30-61	9- 7-61	
67	7-28-61	9-15-61	
21	3-20-61	6-19-61	
307	7- 7-61	9-26-61	
60	8- 5-61	9-29-61	
305	8- 4-61	11- 9-62	
710	9-21-61	11-23-61	
64	9- 1-61	11-14-61	
68	9-26-61	11-28-61	
69	5-20-61	8-21-61	
61	9-16-61	12-21-61	
28	2-25-61	6-19-61	
71	11-26-60	2-15-61	(11-3-61)
27	1- 7-61	2-25-62	(Approx.)
26	12-31-60	2-15-61	
56	11-23-60	2-10-61	(7-31-61)
217	3-17-62	6-25-62	H. S. Homes
209	10-28-61	5-11-62	
25	8-26-61	10- 4-61	
72	12- 1-69	3-15-61	
48	10-27-61	3-10-62	(4-17-62) model
192	10-14-61	4-17-62	
78	2-15-62	5-10-62	
185	11- 8-61	5-10-62	
412	11-22-61	5-15-62	
477	11- 1-61	5-10-62	(Approx.)
478	11- 1-61	5-10-62	(Approx.)
49	12-28-61	office not completed	

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PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES

Comes the plaintiff, by counsel, and for its Answers to the Interrogatories propounded to it by defendants, states:

1. Identify each person whom the plaintiff expects to call as an expert witness at the trial of this action.

Answer:

A. B. Fortner, Jr., Paul Semonin, Edward Horn, Dr. John T. Mastin, and Charles Will.

2. State the subject matter on which each expert witness identified in answer to Interrogatory 1 is expected to testify, the substance of the facts and opinions to which he is expected to testify and a summary of the grounds for each opinion.

Answer:

A. B. Fortner, Jr., Paul Semonin and Edward Horn will testify as they testified at the previous trial of this action.

Dr. John T. Mastin, Professor of Banking, University of Georgia, Athens, Georgia, during the period from at least 1958 through 1965 was the Professor of Banking at the University of Kentucky, Lexington, Kentucky and in charge of the educational program for the Kentucky Bankers Association. Dr. Mastin has extensive knowledge of loans and financing in the State of Kentucky during the period which is the subject matter of this litigation and his testimony in substance will be as follows:

"During the period 1959-1961, United States Steel Homes Credit Corporation negotiated with and made loans to Fortner Enterprises, Inc. on terms that were very unique. The loan was equal to 100 percent of the cost of the land and its development. It is my opinion

that loans on these terms were very unlikely to have been available from other financing sources.

The loans terms were unique in several respects:

1. The loan was for 100 percent of the cost of the land acquisition and development. Loans equal to 100 percent are considered high risk since the borrower has no direct financial stake in the project. Prudent lenders would not make 100 percent loans, particularly during a period of time when the price level is stable and an inflationary appreciation of values is not indicated. The period 1959-1961 was one of price stability as measured by the Bureau of Labor Statistics Wholesale Price Index.

2. The loan was guaranteed, not by an affiliate of the borrower but by an affiliate of the lender. This is a most unusual arrangement.

3. The loan was tied to the condition that the borrower purchase homes from United States Steel Homes Credit Corporation. The borrower could not use the funds to buy houses from other manufacturers.

4. The rate of interest was 6 percent with an additional ½ of one percent fee. The prime rate, which is available only to the largest and most credit worthy borrowers, was, at this time around 4.5 percent. However, due to compensating balance requirements (usually 20 percent), the real cost of credit for prime borrowers was probably between 5 and 5½ percent. The loan involved in this case, to Fortner Enterprises, would not qualify as prime; to the contrary, it involved a very high risk. Under these circumstances, the 6 percent rate plus the ½ of one percent charge must be regarded as very favorable to the borrower. Without a guarantee, the borrower could not have expected comparable terms from other sources of credit.

It is my opinion that a loan under comparable terms would not have been available from other credit sources during the period in question. The loan was not a prudent loan for any conventional lender. In addition, most conventional sources of credit are precluded by laws and regulatinos from making 100 percent loans on undeveloped property.

During the period 1959-1961, national banks could lend only upon improved real estate. Federally chartered savings and loan associations could lend only up to 70 percent on developed real estate. Only three state chartered building and loan associations operated in the Louisville market area, two of these have since been placed in receivership. It is doubtful that these associations would have made a 100 percent nonguaranteed loan. There were no mutual saving banks in Louisville or in the State of Kentucky, a situation which still prevails.

Credit Unions are cooperative credit institutions lending only to members. Loans tc members are small in amount and intended mainly to finance consumer goods purchases. Small loan companies and sales finance companies are privately owned. They also make loans to purchase consumer goods. These two institutions would not have been a source of credit for the financing of Fortner.

Pension funds and insurance companies make real estate loans for construction and development. Such institutions are charged with a responsibility of protecting the funds entrusted to them. It is highly improbable that they would have made this loan on the terms and conditions granted by Credit Corporation. It would not have been prudent to have done so. Mortgage companies act primarily as middlemen; making loans and selling them to basic lenders, such as: savings and loan associations, insurance companies, pension funds, etc. Mortgage companies are unlikely, as prudent lenders, to make loans that cannot be sold to other lenders.

It is, therefore, my opinion that the loan by Credit Corporation to Fortner was unique to the extent that funds could not have been obtained from other prudent lenders on the same terms."

Mr. Charles Will, President of Portland Federal Savings & Loan Association, will testify that Portland Federal Savings & Loan Association, as a Federally insured savings and loan association, was prohibited by regulation from making 100 percent land acquisition and development loans or loans comparable thereto during the period 1959-1961, and as far as that is concerned, up to the present date. Even if they had not been prohibited by regulation from making such loans, Mr. Will will testify that Portland Federal Savings & Loan Association certainly would not as a matter of policy or prudent business judgment make such loans.

Mr. Charles Will will further testify that during the period 1959-1961, he was familiar with the character of the land acquisition and development loans made in Louisville and Jefferson County, Kentucky, and that 100 percent land acquisition and development loans of the type made to the plaintiff were not generally available under such terms or comparable terms to borrowers in the Louisville and Jefferson County area.

Mr. Charles Henney of Prudential Life Insurance Company will testify as he testified at the last trial of this action, i. e., specifically about the policies and practices of the company.

Mr. Ralph Logan, President of Southern Savings & Loan Association, will likewise testify about the policies and practices of Southern Savings & Loan Association. Mr. Logan will testify that Southern Savings & Loan Association did not have the funds to make a 100 percent land acquisition and development loan to Fortner

Enterprises, Inc., during the period in question, even if it had a desire to do so but that as a matter of policy and prudent business judgment, no 100 percent land acquisition and development loan of the nature made to Fortner Enterprises, Inc., would have been made at that time or any time by Southern Savings & Loan Association and that no loan of a comparable nature would have been or would be made.

Fortner Enterprises, Inc.,
By: Kenneth L. Anderson
Kenneth L. Anderson
Woodward, Hobson & Fulton
1805 Kentucky Home Life Building
Louisville, Kentucky 40202
Attorneys for Plaintiff

Subscribed and sworn to before me by Kenneth L. Anderson this January 2, 1973.

My commission expires: March 23, 1974.

/s/ Denna B. Hardin (O'Banion)
Notary Public
Kentucky State At Large

It is hereby certified that a copy of the foregoing Plaintiff's Answers to Defendants' Interrogatories was this January 2, 1973, delivered to Mr. Albert F. Reutlinger, 501 South Second Street, Louisville, Kentucky, 40202, Counsel for Defendants.

/s/ Kenneth L. Anderson

[LETTERHEAD OF WOODWARD, HOBSON & FULTON]

November 9, 1973

Mr. Albert Reutlinger
Middleton, Reutlinger & Baird
501 S. Second Street
Louisville, Kentucky 40202

Re: Fortner Enterprises v. United States Steel, et al.

Dear Albert:

Prior to the March, 1973 scheduled trial of the above case you propounded to Fortner Enterprises Interrogatories seeking the substance of the testimony of our experts. In response to that Interrogatory, insofar as it pertained to Dr. John T. Masten, I gave you the substance and I believe a verbatim quotation of Dr. Masten's report to me.

I am not at all certain that I am required by the Federal Rules of Civil Procedure to supplement the information previously furnished to you but I am doing so anyway as a matter of precaution. I conferred with Dr. Masten this week in preparing the case for trial. At that time Dr. Masten advised, as an elaboration of his opinion as to the uniqueness of the land acquisition and development loans made to Fortner Enterprises, Inc., that in his opinion, loans of that nature were actually a separate segment of the loan or lending market and since such loans were not available at the time in question from other sources that in his opinion the Credit Corporation did have economic power in that segment of the market.

Dr. Masten will also point out that in his opinion it is not significant as to whether or not the Credit Corporation had a cost advantage in obtaining money which it loaned and further that in his opinion it is not significant as to whether or not the Credit Corporation made a profit and in any event that the Credit Corporation's profit was not significant.

Very truly yours,

Woodward, Hobson & Fulton
(s) Kenneth L. Anderson

KLA:eb

PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW

BACKGROUND OF THIS LITIGATION

This action was originally filed in 1962 and has had a long history in this and the Appellate Courts since then. Plaintiff, Fortner Enterprises, Inc., is claiming violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2. In 1966 this Court sustained the Motions of defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation] dismissing plaintiff's Complaint as amended [293 F. Supp. 762]. The Sixth Circuit Court of Appeals affirmed without Opinion.

The Supreme Court reversed and remanded the action to this Court with directions for the case to proceed to trial. Fortner Enterprises v. United States Steel Corporation, 394 U. S. 495 [1969]. The Supreme Court's comprehensive Opinion set forth the guidelines for this Court to follow in trying this case before a jury.

During the month of June, 1970, this case was tried before a jury. At the close of all the evidence both plaintiff and defendants moved for directed verdicts on liability. After considering the evidence presented in light of the Supreme Court's Opinion, this Court felt that the undisputed facts established all of the elements of an illegal tie-in agreement which constituted a per se violation of Section 1 of the Sherman Act by both defendants and, therefore, directed a verdict for plaintiffs as to liability. The questions of causation [fact of damage] and amount of damages were submitted to the jury which found for plaintiff and awarded a verdict of $93,200.00. That sum was duly trebled in accordance with the antitrust laws and attorneys' fees and costs were awarded.

Defendants filed Motions for Judgment N.O.V. and New Trial which were overruled. Defendants then appealed to the Sixth Circuit which reversed in part only at 452 F. 2d 1095. The Sixth Circuit found that the facts were undisputed as to two of the three elements of an illegal tie-in agreement, namely, that a tie-in did exist and that a not insubstantial amount of interstate commerce in the tied product was affected, but found that there were varying inferences which a jury might draw from the evidence concerning the third element, sufficient economic power over the tying product. It appeared clear from the Sixth Circuit Opinion to this Court and counsel for all parties that only limited issues of liability were to be retried, with plaintiff to keep its damage Judgment if liability is decided in its favor.

Retrial of the liability issues was scheduled before a jury on November 12, 1973. On that date prior to the commencement of trial plaintiff offered to waive jury trial if defendants agreed and to allow this Court to decide the issues as fact finder based on the record from the 1970 trial plus any additional evidence to be offered by either side. Defendants agreed.

Plaintiff's purpose in waiving a jury was to avoid fragmentation of the evidence, to eliminate any potential problems with instructions and to hopefully finally dispose of this protracted litigation without another time consuming and expensive trial.

This Court commends counsel for all parties for this procedure which should finally put this case to rest.

Supplemental evidence was offered by plaintiff on November 16, 1973 and by defendants on November 20, 1973.

After having again reviewed the evidence introduced at the 1970 trial and having heard and reviewed the supplemental evidence, this Court as finder of fact has concluded

that defendants did have sufficient economic power over the tying product, loans under certain terms and condition, and that the defendant, Credit Corporation, did have a competitive advantage in the credit market to enable it to impose the tie-in agreement on plaintiff and that the defendants were, therefore, in violation of the Sherman Act. My detailed findings of fact and conclusions of law follow.

FINDINGS OF FACT

1. When this case was appealed to the Sixth Circuit Court of Appeals following the June, 1970 trial, a three volume Joint Appendix was printed and filed with the Sixth Circuit. Most of the evidence relied upon by the parties is contained in those three volumes. Any evidence or other material relied upon in these Findings which appears in the three volume Joint Appendix will simply be referred to by page number in parenthesis. All pleadings, testimony or exhibits relied upon which do not appear in the three volume Joint Appendix will be otherwise appropriately identified.

2. Fortner Enterprises, Inc., plaintiff herein, is a corporation organized under the laws of the Commonwealth of Kentucky with its principal place of business in Louisville, Jefferson County, Kentucky. Its principal stockholder is A. B. Fortner, Jr.

3. The defendant, United States Steel Corporation, is generally known to be the largest manufacturer of steel in the United States and is one of our Nation's largest corporations. For some time prior to 1959, one of United States Steel Corporation's Divisions has been known as the United States Steel Homes Division [hereinafter called Homes Division], which had as its function the manufacture and assembly of component parts which comprise various models of prefabricated house packages.

4. The defendant, U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation], is a separate corporate entity owned by United States Steel Corporation and is, therefore, a subsidiary of United States Steel Corporation. The Credit Corporation was established in 1954 [Certificate of Incorporation, PX 2-E].

5. The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954 meeting [PX 1-M; 108], which recommended that a financing corporation be established to provide construction money and to originate mortgages for resale to investors [1088, 1089]. That exhibit indicates that the proposed finance corporation ". . . will not be used as a means to force sales to dealer-builders" [1090].

6. The United States Steel Corporation's Finance Committee Minutes [PX 1-W; 1095, 1096], authorized and directed the Credit Corporation to establish a "special" financing program of land acquisition and development loans to dealers in order to enable the Homes Division ". . . to obtain a minimum distribution of 1800 units in 1959, and such additional distribution as may be feasible . . .". Those loans were to be ". . . without conformity with conventional or conservative patterns but within the bounds of prudent business judgment;" provided that the Homes Division underwrite and guarantee losses to a defined extent. Subsequent Finance Committee Minutes indicate that the program was authorized to assist in increasing sales of the Homes Division for 1960 and 1961 [1098].

7. The Court thus finds that there was a change in policy established by the defendants which resulted in Credit Corporation's loans being used as a "tool" to aid the Homes Division in making sales of prefabricated house packages.

8. The Homes Division's factory and principal office in 1960 was located in Southern Indiana just across the Ohio River from the Louisville, Jefferson County, Ken-

tucky area. The Homes Division at that time desired to expand its sales of prefabricated house packages in the Louisville, Jefferson County, Kentucky, area. At that time, Mr. A. B. Fortner, Jr., and another gentleman owned a corporation known as Iroquois Developers which owned a subdivision in Jefferson County, Kentucky. A portion of that subdivision had already been developed and the lots had been sold to builders who had built houses upon them. The remaining portion of that subdivision had been partially developed by the construction of streets and installation of necessary utilities and the remainder of the subdivision, while platted, was still undeveloped [PX 42 and 43; 1226-1228].

9. One of Mr. Fortner's salesmen learned of the special financing program of the Credit Corporation and advised the Home Division personnel of Mr. Fortner's interest in the subdivision in Jefferson County, Kentucky. As a result, Mr. Fortner was contacted by Homes Division representatives and negotiations were commenced designed to interest Mr. Fortner in building prefabricated house packages in the subdivision [211, 212]. At that time Mr. Fortner was advised of the Credit Corporation's special financing program which could provide loans for land acquisition and development as well as the purchase and building of the houses themselves [212].

10. Credit Corporation representatives then became involved in the negotiations which resulted in their offering Mr. Fortner 100% land acquisition and development loans plus all of the money which would be required to purchase the prefabricated house packages and build them [214, 215]. The negotiations at that point had been premised upon Mr. Fortner buying out the interest of his co-stockholder in Iroquois Devlopers. However, in Mid-1960, Mr. Fortner's co-stockholder, a Mr. Robards, indicated that he would not

consent to be bought out and that he desired to attempt to undertake the development and buy out Mr. Fortner's interest. Mr. Fortner agreed to this and Mr. Robards then commenced negotiations with the Credit Corporation but could not make an arrangement with them. Mr. Robards then agreed to sell his interest to Mr. Fortner in Iroquois Developers and the negotations between Mr. Fortner and the Credit Corporation were reactivated [PX 43; 1227, 1228].

11. The Credit Corporation then reaffirmed its offer of 100% land acquisition and development loans plus all of the money Mr. Fortner would require to purchase the prefabricated house packages and build the houses. This offer was conditioned upon an agreement that there would have to be erected on each lot in the subdivision a prefabricated house package manufactured by the defendant, United States Steel Corporation [220, 221].

12. A. B. Fortner, Jr., had for quite a number of years prior to 1959 owned a real estate brokerage company in Louisville, Kentucky, known as Zetwock-Fortner Corporation which had sold thousands of residential properties in the Louisville and Jefferson County, Kentucky area [206]. Mr. Fortner, through other companies, had been involved in real estate development and had also been involved in the construction of some residential dwellings. As a result, Mr. Fortner was personally familiar with the type of land acquisition and development loans available in the Louisville and Jefferson County area, and to his knowledge, particularly, 100% land acquisition and development loans were not available from any conventional lending source of any type or any source known to Mr. Fortner in 1959 or 1960 [221].

13. The type of loan offered Mr. Fortner by the Credit Corporation was highly attractive and unique to Mr. Fortner since to his knowledge no such loans were available from other sources and for that reason he was willing to accept

at that time the requirement that he erect upon each lot in the subdivision a prefabricated house package manufactured by the Homes Division of United States Steel Corporation.

14. Mr. Fortner, prior to and during 1960, owned all but a few shares of a corporation known as the Gold Rose Gift Shop. This corporation was dormant and had a $16,000.00 deficit, and it was agreed that its name would be changed to Fortner Enterprises, Inc., and that said corporation would purchase the subdivision in question from Iroquois Developers. Mr. Fortner was not required to personally endorse or guarantee the loans to be made by Credit Corporation to Fortner Enterprises, Inc.

15. As a result of the above described negotiations, in October, 1960, notes, a mortgage and a loan agreement were executed by Fortner Enterprises in favor of the Credit Corporation [44-74]. The notes bore an interest rate of 6% and a fee or discount of ½ of 1%. The loan agreement specifically contained the requirement that Fortner Enterprises, Inc., purchase and erect on each lot in the subdivision a prefabricated house package manufactured by the Homes Division of United States Steel Corporation. The contractual obligations represented by the notes, mortgage and loan agreement were between Fortner Enterprises, Inc., and the Credit Corporation. The United States Steel Corporation was not a party to that agreement. However, that agreement did specifically contain the tie-in requirement of the purchase and erection of the prefabricated house packages of the Homes Division of the United States Steel Corporation.

16. Since it is undisputed that the tie-in provision was in the loan agreement and since the defendants have offered no additional evidence raising any question as to the existence of the tie-in provision, in accordance with the last Opinion of the Sixth Circuit in this case, this Court finds

as a matter of law that the tie-in agreement complained of by plaintiff did exist.

17. Following the execution of the notes, mortgages and loan agreement, Fortner Enterprises ordered and erected certain model homes, had a grand opening and commenced the sale of houses from the models [222-224]. Sales initially were quite good and Fortner Enterprises began building the houses sold in the first few months following the grand opening [231], During the Summer of 1961, as Fortner Enterprises began building the homes which had been sold, an additional 32 lots became available in the subdivision which had been sold to a contractor who had become the General Superintendent for construction in the project in question. The Credit Corporation agreed to make another 100% land acquisition and development loan to add these 32 lots to the project with the loan also to meet all requirements for the purchase of the prefabricated house packages and building of the houses and this transaction was concluded in August, 1961 by the signing of a note, mortgage and loan agreement. That loan agreement also contained the tie-in provision referred to above [254-255].

18. During the June, 1970 trial of this action, plaintiff introduced substantial evidence which plaintiff claimed established that it had encountered certain problems with the Homes Division prefabricated house packages, including shortages of components upon delivery and defects in design and manufacture. Plaintiff claimed that as a result of these problems, its subdivision developed a bad reputation and lack of consumer acceptance which resulted in plaintiff's inability to sell additional houses. The evidence was introduced primarily to establish the fact of damage to the plaintiff which was resolved by the jury in the 1970 trial in favor of the plaintiff. This evidence is alluded to in these Findings only as background for the events which occurred after plaintiff began complaining to the Homes Division

about shortages and defects in design and manufacture of component parts.

19. Mr. Fortner testified that in the latter part of 1961 he contacted Mr. Richard Dyas, Vice President of the Credit Corporation, and advised him of the unsatisfactory character of the prefabricated house packages of the Homes Division and his company's inability to sell them and requested that Fortner Enterprises, Inc., be relieved of the tie-in provisions of the loan agreement in order that it might build another prefabricated house package or a conventional home. Mr. Dyas refused this request [256, 257].

Fortner Enterprises, Inc., continued to attempt to sell the Homes Division's prefabricated houses and continued to complain of the quality of those houses until June 5, 1962 when a meeting took place at the offices of counsel for the plaintiff which was attended by Mr. A. B. Fortner, Mr. Herman Miles and others representing the plaintiff and by Mr. Black and others representing the Homes Division of United States Steel Corporation and by Mr. Dyas and Mr. Rollings of the Credit Corporation. The Court finds that the witnesses for all parties agree that plaintiff's complaints concerning the prefabricated house packages were expressed at that meeting and that plaintiff sought to be relieved of the tie-in appearing in the loan agreements in order that plaintiff might build another type of prefabricated house or a conventional house in its subdivision thereby making it possible to pay off its debt to the Credit Corporation. This request was refused by Mr. Dyas of the Credit Corporation [261-263].

20. The Court finds that Fortner Enterprises' account with the Credit Corporation was current as of the June 5, 1962 meeting [PX 242; 1300, 1301], but that immediately following the June 5, 1962 meeting the Credit Corporation began the preliminary steps required to foreclose upon the

plaintiff's subdivision under the mortgage given as a part of the package [PX 126 and 127; 1247-1250; PX 132, 1258-1263]. As a result the Credit Corporation wrote the plaintiff on July 12, 1962 demanding payment of all outstanding obligations [PX 3; 75].

21. Shortly after the July 12, 1962 letter on July 19, 1962, this antitrust action was filed by plaintiff against both defendants [38-76].

22. The second required element of an illegal tie-in agreement violative of the Sherman Act is that a not insubstantial amount of interstate commerce in the tied product be restrained. Plaintiff's evidence established that under the two loan agreements entered into with the Credit Corporation plaintiff was required to purchase 210 prefabricated house packages. The least expensive house package which plaintiff was purchasing cost plaintiff approximately $3,150.00 [637]. This amounts to a total of $689,850.00 worth of house packages which plaintiff was obligated to purchase under the terms of the loan agreement and under the requirements of the tie-in contained therein. In addition, the undisputed evidence from the defendant's own records established that with insignificant exceptions, all loans made by the Credit Corporation contained the tie-in agreement [742-744] resulting in millions of dollars of sales of house packages by the Homes Division in 1960, 1961 and 1962 [1199]. Thus, the undisputed evidence established that substantial amounts of interstate commerce in the tied product, the prefabricated house packages, were restrained by the tie-in agreement, or agreements, complained of whether plaintiff's own purchases or commitments to purchase are viewed by themselves or whether they are viewed as a part of the larger volume of sales connected with Credit Corporation's entire lending program. Since no new evidence was introduced by defendants concerning this element

of the case, in accordance with the Supreme Court's Opinion in this action and the last Opinion of the Sixth Circuit in this action, this Court finds as a matter of law that plaintiff has met its burden concerning this element and that as a matter of law a not insubstantial amount of interstate commerce in the tied product was restrained.

23. The third required element for the establishment of an illegal tie-in agreement violative of the Sherman Act involves the Credit Corporation's economic power over the tying product, in this case, loans under certain terms and conditions to appreciably restrain trade in the tied product. As previously indicated, this Court finds that the Credit Corporation did have sufficient economic power over the tying product or element and the evidence which leads the Court to this conclusion is set forth in the following series of Findings.

24. William H. Lang was President of the defendant, Credit Corporation, during all times pertinent to this litigation [895]. Portions of Mr. Lang's deposition were read into evidence by plaintiff. Mr. Lang testified that when a dealer, such as Fortner Enterprises, was not able to finance through local or normal channels, the Homes Division of the defendant, United States Steel Corporation, would call in the Credit Corporation to meet the dealers' financing problems [896]. Mr. Lang went on to testify that the Credit Corporation consistently aided the Homes Division sales program through aid given to dealers [897], and he went on to testify that the Credit Corporation had made loans at the insistence of the Homes Division when the Credit Corporation did not consider the loans to be a good financial risk when regular banking and financial principles were applied [897, 898]. Mr. Lang at the trial of this action itself testified that at the direction of defendant, United States Steel Corporation, the Credit Corporation instituted

in 1958 its special financing program concerning land acquisition and development to help the Homes Division increase its sales of house packages, that the loans made at the request of the Homes Division under the special financing program were to be guaranteed by the Homes Division including specifically the Fortner Enterprise's loans [972-975]. Plaintiff's Exhibit 237 [1258], is the Underwriting Agreement in which the Homes Division guaranteed the land acquisition and development portions of the Fortner loans as well as loans made to a number of other dealers under the special financing program. This Court thus finds that the defendants' own witness has testified that the loans made under the Credit Corporation's special financing program were a special type of loan not available from normal or conventional sources.

25. The Underwriting Agreement [Plaintiff's Exhibit 237, 1268], lists forty-three [43] separate loans which were classified as the high risk type loans for which the Credit Corporation wanted to be protected by the Homes Division [981]. These were all land acquisition and development loans [980].

26. Turning specifically to the loans made to Fortner Enterprises, Inc., for land acquisition and development, the evidence was undisputed that those loans made by Credit Corporation to Fortner Enterprises, Inc., amounted to 100% of Fortner Enterprises' cost to acquire the land in question and to develop it, including the installation of streets and all utilities to the point that the lots were ready to have houses built on them. This was the portion of the loan which the defendant, United States Steel Corporation, guaranteed to the Credit Corporation. The evidence also established that the construction portion of the loans from Credit Corporation to Fortner Enterprises amounted to all of the funds which Fortner Enterprises required under nor-

mal circumstances to build houses on the lots. The construction loan, of course, did not cover costs incurred by Fortner Enterprises at the closing of a sale to a purchaser, nor did they include Fortner Enterprises' profit.

27. The Court finds from Mr. Fortner's testimony that 100% land acquisition and development loans were quite unique to Mr. Fortner as President of the plaintiff corporation. Mr. Fortner had been associated with the real estate business in many capacities for quite a number of years before the transactions in question. He had been involved himself in the development of subdivisions and in obtaining financing for such development, as well as in assisting in obtaining financing for customers or clients. Mr. Fortner was familiar with the types of land acquisition and development loans available in the Louisville area and he has testified that no such loans, to his knowledge, were available from any other source, particularly when the other significant terms of the loans were considered. Those terms were 6% interest plus ½ of 1% discount fee, along with no requirement of a personal guarantee by himself as President of the corporation or by any other officer of the corporation.

28. Mr. Fortner's testimony and other substantial evidence and testimony which were not contradicted by defendants have convinced this Court that the loans in question were unique. This Court has taken judicial notice that Federal statutes or regulations prohibit Federally insured banks and savings and loan associations from making 100% land acquisition and development loans. Mr. Edwin Horn, President of Louisville Mortgage Service Company, testified in this action. Louisville Mortgage Service Company at the time in question and for many years prior thereto has been in the business in Louisville, Kentucky, of making loans for commercial investors, including commercial banks

and insurance companies. None of Mr. Horn's customers were making 100% land acquisition and development loans on the terms given to Fortner Enterprises or any terms during this period of time and such loans to Mr. Horn's knowledge were not available in this area during that time.

29. Mr. Charles Henne of Prudential Life Insurance Company testified that as a matter of policy Prudential Life Insurance Company was not making any land and acquisition development loans during the period of time in question, much less 100% land acquisition and development loans.

30. Mr. Paul F. Semonin is one of the best known realtors and real estate developers in the Louisville and Jefferson County area. Mr. Semonin has been associated with the real estate business in this area for about 35 years [868]. During the period 1969 through 1961, Mr. Semonin was familiar with the type of financing available to developers and builders and his testimony was that there were not any 100% land acquisition and development loans available from normal or conventional sources during that period of time [868-869].

31. Plaintiff, as a part of its supplemental evidence presented on November 16, 1973, called Mr. Ralph Logan, President of Southern Savings & Loan Association, a Louisville, Kentucky state chartered savings and loan [November, 1973, Transcript, p. 139]. Southern Savings & Loan did not make any land acquisition and development loans during the pertinent period of 1959-1961 [p. 142]. The largest loan which Southern Savings has ever made has been somewhere between Two Hundred and Two Hundred and Fifty Thousand Dollars [p. 143]. Mr. Logan testified that Southern Savings would not have made a land acquisition and development loan of the character which the Credit Corporation made to Fortner Enterprises whether

or not Fortner Enterprises had a deficit at its beginning [pp. 143, 144]. Mr. Logan, as President of Southern Savings during 1959 through 1961, kept abreast of market conditions in the Louisville area and the types of loans that were available and he was unaware of any building and loan associations that would have made a 100% land acquisition loan during that period and he didn't know of any body making such loans during that period [p. 145]. In his opinion a 100% land acquisition and development loan is not a prudent loan due to the risk factor [p. 146].

32. Mr. Charles Will, President of Portland Federal Savings & Loan Association, was also called as a witness as a part of plaintiff's supplemental proof given in November, 1973 [p. 157]. Mr. Will testified that the Federal regulations applicable to Federally insured savings and loan associations in 1959 limited loans for land acquisition and development to 60% of the value of the raw land and 60% of the development cost [p. 158]. Mr. Will testified that his company could not under the regulations make a 100% land acquisition and development loan [p. 159], and even if they were not restricted by such regulations they would not make such a loan [p. 160]. Mr. Will pointed out that a 100% loan of that nature is not a conservative loan and amounts to the lender buying the property [p. 160]. Mr. Will, as President of Portland Federal, kept abreast of market conditions and the types of loans made during the 1959-1961 period and to his knowledge no normal or conventional lending source was making 100% land acquisition and development loans during that period [pp. 162, 163]. Portland Federal did begin making some land acquisition and development loans at the 60% level in 1961 or 1966 and it is significant to this Court that the interest rate was 6% and the terms of the loans were generally for two years along with service fees which ranged up to 5% [pp. 160-

162]. The Court thus finds that Portland Federal was able to obtain the same interest rate which the Credit Corporation obtained for a loan made for the same period of time, two years, as the Credit Corporation loan to the plaintiff and that Portland Federal was able to obtain a higher service fee for the loan even though the loan in relation to raw land value and development cost was 60% instead of the 100% loan which the Credit Corporation made. Clearly the land acquisition and development loan made by the Credit Corporation to Fortner Enterprises was more advantageous to Fortner Enterprises than the type of land acquisition and development loan which Portland Federal was making. Fortner Enterprises was able to obtain 40% more money at less cost than it theoretically could have obtained from Portland Federal.

33. The defendants called as their witness, Mr. Innes Dobbins, President of Liberty National Bank & Trust Company, as of the time of his testimony, in 1970 [415]. Dr. Dobbins testified as to the study made under his supervision of excess funds theoretically available for lending through banks, savings and loan associations and insurance companies in the Louisville area during the years 1959 through 1962, but there is no evidence in the record that such funds were available for 100% land acquisition and development loans under the terms given the plaintiff in this case. Mr. Dobbins also testified that it was his understanding that during the pertinent period of 1959 through 1961 Prudential Insurance Company and Louisville Mortgage Service Company were making 100% land and acquisition development loans in this area [420, 421]. However, the Court recognizes that Mr. Horn of Louisville Mortgage Service Company and Mr. Henne of Pudential Life Insurance Company have both testified that their companies were not making such loans during that period, as set forth

previously in these Findings. Mr. Dobbins also testified as to a comparison between the rate of earnings of the Credit Corporation and two Louisville Savings Associations of which he had knowledge and found the Credit Corporation's earnings comparable to the Savings and Loan Associations. This Court does not find this comparison to be of great evidentiary significance since it merely indicates that the Credit Corporation was able to make a profit comparable to that of the two Savings and Loan Associations with which its profits were compared in spite of the high risk type loans made under the special financing program. Since the special financing program loans of the Credit Corporation were guaranteed or underwritten by United States Steel Corporation, the Credit Corporation would certainly not be expected to show a loss at least as a result of those loans since any such loss would have been covered by United States Steel Corporation. This comparison merely confirms that the Credit Coporation's interest rate and discount or service fee were comparable to those charged by Savings and Loan Associations.

34. Stanley Mack was called by the plaintiff as a witness at the trial of this action in 1970 [438]. At the time of that trial Mr. Mack was employed by the defendant, Credit Corporation. Prior to that time he had been employed by the Homes Division of the defendant, United States Steel Corporation [439]. During the 1959 through 1961 period, Mr. Mack was the Manager of Sales Division and his job included sales training programs and seminars [439]. Mr. Mack identified Plaintiff's Exhibit 7 as a portion of the Homes Division's Sales Manual and it was duly offered into evidence [441]. Mr. Mack further identified the land acquisition and development portion of that Sales Manual as having been part of a refresher seminar given to the Homes Division personnel after consultation with

the Credit Corporation [442-445]. Plaintiff's Exhibit 240 [1279], is a portion of the Sales Manual which is Plaintiff's Exhibit 7. Exhibit 240 was attached to Plaintiff's Exhibit 238 [1275], which is a letter from the head of the Homes Division, D. H. Boyd, to the Assistant General Solicitor of United States Steel Corporation dated August 1, 1962 and referring to this litigation. That letter states in part:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department, in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category." [1275, 1276].

It is clear from reading the Sales Manual of the Homes Division and the Credit Corporation's Minutes and other documents placed in evidence by plaintiff which were obtained from the defendants that the Credit Corporation's primary function was to make loans at whatever terms were required to obtain sales of prefabricated house packages for the Homes Division. In referring to land acquisition and development loans, the Sales Manual states:

> "When asked, 'What's your land development deal?', you can almost answer with the question, 'How high is up?'." [1287].

The Sales Manual concerning land acquisition and development loans goes on to point out that ". . . Most of the other major manufacturers make development loans in some form or another, but most of them charge a fee of 10% or more in addition to simple interest. We only charge a ½ point fee." [1291].

Finally, that Sales Manual sums up the way in which the Credit Corporation was used as follows:

> "There have been a good number of special loans made in the past three years, each one a little different, but each one with some merit. Conversely, in some cases the Credit Corporation turned down what seemed to be a good real estate loan, but didn't look as though it would produce home shipments. I know of one case where there was a choice piece of ground, in an excellent location, supported by a strong market. The requested loan was to be guaranteed by a multi-million dollar corporation. From a pure real estate investment standpoint, it was excellent. However, we chose not to recommend the loan to the Credit Corporation because we couldn't see a full time qualified general manager or anyone in the organization with the ability

> or the time to merchandise our homes. In other words, I just didn't see how we would get very many houses shipped. Sure, the loan was secure, and the Credit Corporation would be paid back, but we wouldn't accomplish our only purpose in making the loan and that is shipping houses. That's why the Credit Corporation exists and that should be our first consideration before requesting financing assistance." [1296].

Concerning the leverage which the special financing program conferred to the Homes Division through the Credit Corporation, the Sales Manual states:

> "Does this approach sound a little rough on the dealer? I don't think so. Remember, he helped to determine a conservative one year program of development, in this case 40 lots. But the loan is paid back in only 22 lots. All you're asking him to do is produce in two years what he said could be done in less than one. Do you see the lever that this gives you? He is more likely to push hard to sell our houses when there is a penalty if he doesn't. People like to take the line of least resistance. Before this clause was put in, a program could be opened, and start slowly. It was easy to say, 'It's obviously the product, we'll go back to conventional or something else.' Now a program is opened, sales start slowly and the thinking is, 'Let's bring in a new model,' or 'Let's improve on our advertising.' I think it gives us an excellent sales tool. It is not necessary for you to try to explain this to your dealer or prospect. It can be a matter of negotiation between the dealer and the Credit Corporation. I just wanted you to be aware of it." [1292].

35. Certain actions of the defendants confirm the application of the special financing program as described in

the Sales Manual. In March, 1960, for example, while the negotiations were taking place which resulted in the October, 1960 agreements, the Credit Corporation was asking for assurances from the Homes Division that if Fortner Enterprises failed, the Homes Division would put the property in production or get another dealer to take over the project [PX C-21; 1134, 1135; PX 55, 1232, 1233].

Even earlier in January, 1960, a memorandum from Lang to Dyas [PX C-23, 1313] states:

> "With regard to (b) above, we should know, if possible, or at least have confidence that the dealer can make a satisfactory profit from the use of our product. With all of our money out front, he has very little incentive to finish off a project. If his profits are not adequate or are not comparable to his prior experience, then we probably do not have a good loan. In making this statement, it is not the financial risk aspects which are referred to, but rather the fact that the loan will not produce house sales. The worst thing that can happen—and perhaps we have it at Broyhill—is an unsuccessful development. This precludes, in most cases, any other house sales in that area, because the one we have there has been unsuccessful."

Thus, the Court finds that the Credit Corporation was not so much concerned with the risks involved in loans but whether they would help sell houses.

36. Plaintiff propounded to defendant, Credit Corporation, Requests for Admissions which were introduced in their entirety as Plaintiff's Exhibit 2. In response to Request for Admission 19, the Credit Corporation admitted "that the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance from the Credit Corporation

for the years 1960, 1961 and 1962 are as follows: 1960, 68%; 1961, 70%; 1962, 75%."

The Credit Corporation in response to Request for Admissions 20, admitted that loan commitments for 1960 of the Credit Corporation totalled $22,625,805.00, for 1961 totalled $19,342,612.00 and for 1962 totalled $19,283,544.00.

The Credit Corporation in response to Request for Admissions 21, admitted that all loan commitments entered into in 1960, 1961 and 1962 contained the tie-in provision which is the subject matter of this suit, with relatively insignificant exceptions totalling $627,000.00 [742-744].

37. Land financing loans [land acquisition and development loans] outstanding at the end of 1960 amounted to $5,372,000.00 [1353], while house package sales of the Homes Division for that same year amounted to $6,747,353.00 [1199]. Land financing loans outstanding at the end of 1961 amounted to $5,918,000.00 [1353], while house package sales of the Homes Division were $5,051,992.00 for that same year [1199].

38. An analysis of the loans dated prior to the end of the calendar year 1961 listed in the attachment to the Underwriting Agreement in which the defendant, United States Steel Corporation, guaranteed certain identified land acquisition and development loans which qualified under the special financing program including those made to the plaintiff amounted to $7,738,000.00 [1273, 1274], which figure was substantially in excess of the slightly over Five Million Dollars worth of house package sales made during the year 1961.

39. The evidence established that the Credit Corporation was funded by its parent corporation, United States Steel Corporation, partially by the purchase of stock, partially by loans from United States Steel to the Credit Corporation at an interest rate of one point above the appli-

cable prime rate and partially through the Credit Corporation's borrowings from banks at the prime rate using the credit standing of United States Steel.

While United States Steel Corporation had elected to allow the Credit Corporation to obtain the bulk of the Credit Corporation's funds through borrowings from banks at the prime rate based on United State Steel's credit standing, the record also establishes that in July, 1961, United States Steel had agreed to purchase, upon request of the Credit Corporation, an additional Nine Million Dollars' worth of stock and further had agreed to advance an additional Twenty-nine Million Dollars which would have been subordinated to the bank loans [1101, 1102].

40. The Credit Corporation's financial statements [1349-1355], indicate that it paid no dividends to United States Steel and that it had full use of its accumulated income.

41. The annual report of the defendant, United States Steel Corporation, for 1961 was introduced into evidence [1185]. This report also contained the figures for 1960. That report indicates that United States Steel Corporation had net income after taxes in 1960 of $304,200,000.00 and in 1961, of $190,200,000.00. It had cash and securities of $451,700,000.00 in 1960, and of $642,200,000.00 in 1961, and it had total assets, less current liabilities in excess of 3.8 Billion Dollars in 1960 and in excess of 4.3 Billion Dollars in 1961.

42. An analysis of the Credit Corporation's income statements for 1960 and 1961 [1355], indicates that the bulk of the Credit Corporation's expenses represent interest on loans payable. Obviously the United States Steel Corporation elected to use its credit standing with banks to allow the Credit Corporation to obtain the bulk of its capital from banks at the prime rate instead of United States Steel

Corporation simply injecting the necessary capital into the Credit Corporation through the purchase of stock which would not have cost the Credit Corporation anything for its use in terms of paying interest therefor.

43. Plaintiff called as a witness at the 1970 trial Mr. Herman Miles. Mr. Miles and his company were the supervisors of the construction at the plaintiff's project in question. Mr. Miles had had experience in house building and was president of a local lumber company. Mr. Miles had had vast experience in computing the cost of building houses. Mr. Miles testified as to a comparison which he had made of the prefabricated house package of the Homes Division with the cost of materials and assembly of a conventional house comparable to the Homes Division house package and found that the United States Steel house package was priced $455.00 more than the comparable components at the same point in a conventional home [637].

44. Plaintiff called as an expert witness Dr. John Masten on November 16, 1973 at the time plaintiff's supplemental evidence was presented. Reference to Dr. Masten's testimony in these Findings will, therefore, be to the Transcript of Evidence of the November, 1973 testimony.

Dr. John Masten has Bachelor and Master's Degrees from the University of Illinois and a Ph.D from the University of North Carolina. A rather extended summary of his background and qualifications and publications was filed without objection as Plaintiff's Exhibit 500.

Dr. Masten was a Professor at the University of Kentucky from 1948 to 1967. During the approximate five year period prior to his leaving the University of Kentucky in 1967, Dr. Masten had been the head of the Department of Economics and the Director of Graduate Study in Economics at the University of Kentucky (p. 22). Dr. Masten left

the University of Kentucky in 1967 to go to the University of Georgia where he teaches courses in Commercial Banking at the undergraduate level and courses in Money and Capital at the graduate level [p. 21].

During Dr. Masten's 19 years at the University of Kentucky the principal area of his teaching responsibility had been devoted to the financial or banking field and he had been active in and the Director of the program sponsored by the State Department of Banking, the University of Kentucky and the Kentucky Bankers Association which operated the annual program of the Kentucky School of Bankers and he had continued to maintain that connection with the Kentucky School of Banking since his tenure at the University of Georgia [pp. 22, 23].

Dr. Masten, since he has been at the University of Georgia, has been the Program Director also of the Georgia Banking School. Both schools have a program that covers various areas of banking, including investments, management of bank funds, manpower utilization and most importantly, lending. In this connection, Dr. Masten constantly collects and reviews loan cases [pp. 23-26].

Dr. Masten has devoted a good deal of his time during the past 25 years to the collection of loan cases and study of them in Kentucky [p. 26]. As a result of his work as an Economics and Banking Specialist at the University of Kentucky and his work in banking, and particularly the lending aspects of banking in conjunction with the Kentucky Bankers Association, Dr. Masten has a general knowledge of the principles that bank and non-bank lenders would follow in making land acquisition and development loans in Kentucky, including the Louisville and Jefferson County area for the period 1959, 1960 and 1961 [p. 30].

The Court finds that Dr. Masten was highly qualified to testify in the lending and economic areas involved in this

litigation and Dr. Masten's qualifications were certainly not questioned by counsel for the defendants. Dr. Masten's particular background in Kentucky, including the period of time involved in this lawsuit, especially qualify him to testify about lending policies and practices in the Kentucky area.

Dr. Masten first pointed out that all loans are not the same and that there are risk differentials that make each loan almost separate in its own characteristics [p. 27]. Assuming that all terms and conditions are the same, Dr. Masten pointed out that the larger the percentage of a land acquisition and development loan to cost of the land acquisition and development, the higher the risk of the loan becomes to the lender [p. 28].

He pointed out that a lender would want to be protected by some type of guarantee, whether it be in the context of the amount of the loan relative to the value of the property or a guarantee by some third party [p. 28]. In other words, normally a lender will lend a borrower money if the borrower could prove that he really doesn't need it [p. 28].

It was brought out that Dr. Masten, in preparing for his testimony, had quite properly reviewed various key exhibits in this case including the Loan Agreement in question [Plaintiff's Exhibit 5], the Underwriting Agreement [Plaintiff's Exhibit 237], the Financial Statement of the defendant, United States Steel Corporation covering 1960-1961 [Plaintiff's Exhibit 31], and the 1961 and 1962 Financial Statements of the Credit Corporation [Attachments to Plaintiff's Exhibit 2].

In response to a hypothetical question which included the basic pertinent facts introduced into evidence in this litigation, such as the undisputed fact that the loans for land acquisition and development from the Credit Corporation to Fortner Enterprises represented 100% of the cost

of land acquisition and development thereof, and that as of the time of the first such loan, Fortner Enterprises had a deficit of approximately $16,000.00, and that no personal guarantees were required of any officer of Fortner Enterprises, Dr. Masten testified that a loan such as was made to Fortner Enterprises would not have been available from normal channels of credit. He pointed out that this was a very unique kind of loan and that it was not the kind of loan you would normally find in the housing credit market at that time [pp. 31, 32].

Dr. Masten pointed out that this loan was unique in and of itself because it represented 100% of the cost of land acquisition and development particularly for the period of time in question. Such a loan is of such a high risk nature so that a prudent lender would have been unwilling to have made a loan involving 100% risk [p. 32].

Dr. Masten pointed out that the period of time in question, namely, 1959, 1960 and 1961, was a period of economic stability and not a period of inflation and that there was a definite risk inherent in a 100% loan under such conditions of economic and price stability [pp. 32, 33]. He referred in support of his testimony that this was a period of economic stability to the wholesale price index.

One of the other unique characteristics of this loan as brought out by Dr. Masten was that the loan was guaranteed, not by an affiliate of the borrower but by an affiliate of the lender, namely: United States Steel Corporation [p. 33]. Dr. Masten went on to point out how highly unusual it is for a company connected with the lender to guarantee the loan to the lender. The normal situation is for a company or person connected with or associated with the borrower to guarantee the loan to the lender [pp. 35, 36].

Dr. Masten also pointed out that the tie-in provisions of the loan themselves made the loan unique and at the same time required the borrower to buy houses from the Homes Division as a condition of getting this unique type of loan [p. 33].

Dr. Masten pointed out that the rate of interest charged on these loans was 6% with a ½% fee. He pointed out that the prime rate at that time when all cost factors were considered would have run 5 to 5½% and that the loan to Fortner Enterprises was above the prime rate but still low considering the risk involved in making the loan and that it would have been virtually imposible for Fortner Enterprises to have obtained a loan at that level of interest and fee from any other source [pp. 34, 35].

Dr. Masten pointed out that which had been previously established in the record, which was, that banks generally were prohibited by law from making 100% land acquisition and development loans as well as Federally insured savings and loan associations and that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to the risk involved [p. 37].

It was Dr. Masten's Opinion that the Credit Corporation had economic power by granting terms to the borrower that were so distinctly unique that it was almost inconceivable that the funds could have been acquired from any other source [p. 38].

Dr. Masten pointed out that there are really segments of the credit market and it is not one over-all market. He pointed out that in his opinion 100% land acquisition and development loans of the nature and terms granted to the plaintiff were a segment of the credit market [p. 39], and that if you only have one lender making such loans within that segment of the market, then that lender has economic power within that segment [p. 39].

Finally, Dr. Masten testified that in his opinion, based on his analysis of the situation, including the nature of the loans made by the Credit Corporation and the Credit Corporation's relationship with United States Steel Corporation that the Credit Corporation had definite leverage in the segment of the credit market related to land acquisition and development loans as a lender because of the uniqueness of the terms of the loans made and that this leverage was exercised [pp. 47, 48].

45. Defendants called an expert witness, Mr. Karl Gustav Pearson, who was a Professor of Business Administration at the University of Michigan with a Bachelor of Arts degree, and he also was an Attorney [906]. Mr. Pearson had concentrated his work in the general real estate field but the record does not show that he had concentrated in financing or land acquisition and development loans.

Mr. Pearson expressed an opinion that 100% land acquisition and development loans were available in the Louisville area in 1959, 1960 and 1961 [912]. This opinion was based on a survey which Mr. Pearson allegedly made in Louisville in 1970 within six months prior to the June, 1970 trial. Mr. Pearson did not identify the persons or organizations which he surveyed in Louisville. Mr. Pearson believed that 100% land acquisition and development loans were available from savings and loan associations, real estate syndicates, joint ventures, suppliers of materials that went into construction, sub-contractors and individuals.

The Court finds that Mr. Pearson's testimony is against the great weight of the evidence introduced at the trial of this action and that it was without sufficient foundation to be given substantial weight by this Court.

Defendants listed as potential witnesses at the trial scheduled for November, 1973, two additional expert witnesses, Professor Thomas Gies and Professor Randolph

McGhee, and counsel for defendants requested and received leave of Court to allow Professor McGhee to sit with counsel for defendants and consult with them during the testimony of the plaintiff's expert, Dr. John Masten, given on November 12, 1973. However, neither of those experts was called by counsel for defendants as a witness as a part of defendants' supplemental evidence in November, 1973. The Court feels that a reasonable inference to be drawn from the defendants' failure to call their experts is that those experts would not have substantially contradicted or disagreed with the testimony of the plaintiff's expert, Dr. John Masten.

46. The Court has reviewed the cross-examination of Dr. Masten by counsel for defendants. As indicated above, counsel for defendants did not question the expertise of Dr. Masten. The Court does not find that the cross-examination of Dr. Masten concerning the substance of his testimony materially altered or weakened that testimony as has been outlined in the previous Finding. Actually, on cross-examination, Dr. Masten really put this economic power aspect of this case in context when he pointed out at page 130 of the transcript that a 70% borrower has 30% of his own equity involved and has much more freedom in terms of his choice of lender. Such a borrower does not have to enter into any kind of an agreement which ties him to a certain product.

CONCLUSIONS OF LAW

1. The basic principles on which this case must be decided are set forth in the Supreme Court's Opinion in this case in Fortner Enterprises v. United States Steel Corporation, 394 U. S. 495 and United States Steel Corporation v. Fortner Enterprises, Inc., 452 F. 2d 1095 (6th Cir. 1971). The Sixth Circuit held that there were questions of fact

to be decided concerning the so-called "economic power" aspects of the liability issues of this case. We are guided in particular by footnote 4 appearing at the end of the Sixth Circuit's Decision. The Sixth Circuit points out that if no additional evidence is introduced then there was a tie-in and a not insubstantial amount of interstate commerce in the tied product was affected. No additional evidence has been introduced as to these points and the Court thus finds as a matter of law that there was a tie-in and that the requirements as to the amount of commerce in the tied product have been met.

The Sixth Circuit established as a broad guide for the finder of fact on the economic power issue ". . . whether the Credit Corporation . . . had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . .'". The issue was defined elsewhere in the Sixth Circuit's Opinion as being whether the Credit Corporation possesed leverage in the credit market sufficient to induce buyers in the market for prefabricated houses to accept a less competitive product. This leverage did not have to constitute monopoly power or market dominance.

The Sixth Circuit makes it clear that this Court as finder of fact must evaluate all of the evidence and reasonable inferences to be drawn therefrom in determining the economic power question.

2. This Court concludes under the guidelines established by the Supreme Court and the Sixth Circuit for this case that the Credit Corporation did have sufficient economic power or leverage to induce buyers, including Fortner Enterprises, to enter into the tie-in arrangement which required them to buy prefabricated house packages from the United States Steel Corporation. This Court finds that the purpose of the special financing program

concerning land acquisition and development loans of the Credit Corporation was to be a "tool" to obtain sales of house packages. When United States Steel Corporation established the Credit Corporation it could have used some of its available cash to completely capitalize the Credit Corporation which would have placed the Credit Corporation's cost of money at a non-existent or very low level. Instead of electing this course of action, the United States Steel Corporation purchased a certain amount of stock in the Credit Corporation and allowed the Credit Corporation to use United States Steel's credit standing to borrow money from banks at the prime rate. The special loan program was instituted by the Credit Corporation at the authorization of the Finance Committee of United States Steel Corporation to enable the Homes Division of United States Steel Corporation to sell prefabricated houses. The loans to be made under that program were loans for land acquisition and development to borrowers who could not obtain such funds from conventional sources and these loans were guaranteed by United States Steel Corporation. Since the primary purpose and objective of the Credit Corporation was to assist the Homes Division in making house package sales, the Credit Corporation clearly was not expected to maximize profits and as a matter of fact from its own financial records clearly elected to charge interest rates and fees commensurate with much lower risk loans than the Credit Corporation itself was making.

3. The Court finds that the Credit Corporation did have leverage in the credit market, or a segment thereof. The evidence established in this case that the land acquisition and dvelopment loans made by the Credit Corporation to the plaintiff with the tie-in involved were loans amounting to 100% of the cost of acquisition of land and development of the land at an interest rate of 6% with one-half of

1% fee for a two year term. The interest rate, fee and period of the loan were comparable to loans made by conventional lending institutions for land acquisition and development but no other conventional lending institution during the period of time in question was making 100% land acquisition and development loans while the Credit Corporation was. Many organizations, such as Federally insured banks and savings and loan associations, were prohibited by law or regulation from making such high percentage of loan to value loans. The other conventional lenders in the market at the time were not making such high percentage of loan to value loans because of the great risk involved. When the Credit Corporation elected to make such loans it set itself apart from other conventional lenders because it was in effect willing to take higher risks because it had a purpose or motive which other conventional lenders did not have, namely: to enable its parent, United States Steel Corporation, to sell prefabricated house packages. While some conventional lenders might be willing to take higher risks than others, the evidence is that during the period of time in question in this lawsuit no conventional lenders were willing to take the degree of risk which Credit Corporation was voluntarily and deliberately willing to take for its purposes. This was particularly true insofar as Fortner Enterprises was concerned.

Millions of dollars of loans were made under the special financing category as identified in the Underwriting Agreement filed in this case. All of those loans contained the tie-in provisions. The Credit Corporation thus utilized very effectively the special financing program to enable the Homes Division of United States Steel Corporation to sell millions of dollars of prefabricated houses. This is one of the elements of evidence establishing the economic power or leverage of the Credit Corporation. The fact that the

Homes Division was able to obtain a higher price for its prefabricated package in the same condition of a conventional house is again evidence of the Credit Corporation's leverage, or economic power. While the defendants argue that the Homes Division had a loss during the period in question, the Court does not really find this significant since the Homes Division's loss might well have been greater if the loan program which apparently was its prime method of obtaining sales had not ben utilized. Further, the Court does not feel that you can separate the Homes Division from United States Steel as a whole.

4. The Court finds that the only purpose of the Credit Corporatiton in making loans, particularly under the special financing category, was to increase the sales of prefabricated house packages by United States Steel Corporation. This is not the type of business justification contemplated by the decided cases, including the Supreme Court's Opinion in this case. The Court does not find any evidence in this record to justify the arrangement attacked by the plaintiff.

5. The undisputed evidence established that the special financing program of the Credit Corporation was authorized by the Finance Committee of United States Steel Corporation. Loans were made by the Credit Corporation under that program under the direction of personnel of Homes Division. The United States Steel Corporation and the personnel of the Homes Division used the Credit Corporation's loans as a sales "tool".

6. The Court thus finds that all of the required elements of an illegal tie-in agreement did exist since the tie-in itself was present, a not insubstantial amount of interstate commerce in the tied product was restrained and the Credit Corporation did possess sufficient economic power or leverage to effect such restraint. The Court also finds that United States Steel Corporation and the Credit

Corporation as separate corporate entities did combine or conspire to institute or put into effect this illegal tie-in agreement and that both defendants are responsible and liable therefor.

7. Since this Court has found a per se violation of Section 1 of the Sherman Act by the defendants pertaining to the illegal tie-in agreement, as described above, it is actually not necessary for this Court to decide whether the plaintiff has established a conspiracy to monopolize violative of Section 2 of the Sherman Act. However, since there may be an appeal of this action, the Court in the alternative does find that all of the elements of a conspiracy to monopolize do exist in this record. First, the Court finds that the defendants did combine or conspire to increase sales of prefabricated house packages by United States Steel Corporation by the making of loans to numerous builders containing the tie-in provision. The making of the loans containing the tie-in provision were overt acts in and of themselves in furtherance of the combination or conspiracy. In the context of this particular suit, the Court also finds that the defendants combined or conspired to threaten to enforce or enforce the tie-in provisions of the loan agreement by threatening foreclosure on Fortner Enterprises' property and taking certain steps to commence the foreclosure procedure. The Court finds that the millions of dollars of loans made under the special financing program affecting millions of dollars of sales of prefabricated house packages clearly affected a substantial amount of interstate commerce in both the loans themselves and the prefabricated house packages. Finally, the Court finds that the sole purpsoe of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages and that the implementation of the program constitutes the necessary evidence of

intent to monopolize required. Thus, the evidence described in the Findings of Fact set forth above establishes an illegal conspiracy to monopolize in violation of Section 2 of the Sherman Act.

8. Having found the defendants to be guilty of the per se violation of Section 1 of the Sherman Act and the Sixth Circuit having directed that only the issue of liability be re-tried since a jury has already decided the amount of plaintiff's damage and since a Judgment has already been entered for said damages trebled plus attorneys' fees and costs and said claim having been, therefore, previously established as to amount and thereby liquidated, a Judgment will be entered in this action for the total amount of that previous Judgment of $427,016.75 bearing interest at the rate of 6% per annum from September 18, 1970, until paid. Having found for the plaintiff in this action and the Sixth Circuit Court of Appeals having held that costs should be taxed against the defendants as a result of the last appeal to the Sixth Circuit, the Judgment to be entered will also contain an additional award of attorneys' fees and costs to the plaintiff in this action. Counsel for the plaintiff shall prepare and file the necessary Motion for award of attorneys' fees and costs with supporting Affidavits within twenty days of the entry of these Findings and counsel for defendants shall have twenty days thereafter in which to respond.

James F. Gordon
United States District Judge

Copies to:
Mr. Kenneth L. Anderson
Mr. A. Scott Hamilton
Mr. Albert F. Reutlinger

UNITED STATES DISTRICT COURT
Western District of Kentucky
At Louisville

No. 4392

Fortner Enterprises, Inc., - - - - - Plaintiff

v.

United States Steel Corporation and
United States Steel Homes Credit Corporation, - - - - - - - Defendants

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DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. INTRODUCTION

Filed on July 19, 1962, the complaint in this treble damage antitrust action brought under Section 4 of the Clayton Act (14 U.S.C. §14), claimed that United States Steel Corporation and its wholly owned subsidiary, U. S. Steel Homes Credit Corporation, violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) in that they allegedly forced the plaintiff and others to purchase defective prefabricated houses at higher than competitive prices from U. S. Steel's Homes Division as a condition to obtaining financing for the land on which those houses were to be erected. (JA 38-76 103-32*). No common law claim for breach of contract or warranty or other non-antitrust cause of action was asserted.

The plaintiff, Fortner Enterprises, Inc., claims that it and others were coerced by economic necessity to buy houses, later found to be defective, at artifically high prices because the financing furnished by the Credit Corporation was not available from any other source on as favorable or cheap terms (i.e., loans allegedly equivalent to 100% of the cost of acquiring and developing the land). Such a "tying arrangement," plaintiff argues, constituted a per se violation of the Sherman Act. At prior stages of this litigation, plaintiff has also argued, alternatively, that if it is not a per se offense, the arrangement nonetheless violated Sections 1 and 2 of the Act by rule-of-reason standards.

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*"JA" references are to portions of the record printed in the parties' Joint Appendix filed with the Court of Appeals for the Sixth Circuit following the first trial of this case in June, 1970. Material not included therein will be referred to by identification of the 1970 transcript (Volume and page) or 1973 transcript (page) of trial proceedings, exhibits, depositions, interrogatory answers or other sources now part of the record. Throughout these papers, all emphasis in quoted passages has been added unless otherwise noted.

This Court originally granted summary judgment dismissing the complaint (293 F. Supp. 762). The Court of Appeals for the Sixth Circuit affirmed without opinion (404 F. 2d 936). The Supreme Court granted certiorari and held, in a five-to-four decision, that plaintiff was entitled to a trial of its claims.*

Following a full trial in June, 1970, both sides moved for directed verdicts, and this Court, while denying defendants' motion, directed a verdict for plaintiff, stating to the jury:

> "The arrangement whereby the defendants required the plaintiff to purchase and erect in its Golden Meadows Subdivision only prefabricated house package purchased from the Homes Division of United States Steel Corporation is a tying arrangement; the defendant, U. S. Steel Homes Credit Corporation, possessed sufficient economic power to induce its customers to purchase the tied products, the house packages, and a not insubstantial dollar volume of interstate commerce in the tied products has been adversely affected. The Court therefore holds as a matter of law that this tying arrangement is illegal under the antitrust laws. The Court further finds that the defendants engaged in a conspiracy to establish said illegal tying arrangement and that both defendants are responsible for it. As a consequence, the issues left for your determination are whether the illegal tying agreement caused the plaintiff damage and, if so, the amount of its monetary damages. . . ."

Instructed that single damages could not exceed $250,000, the jury returned a verdict of $93,200 before trebling, to

*Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495 (1969).

which attorneys' fees were then added by the Court (JA 196-99, 1063-72, 1076-77).

The defendants appealed but limited their appeal to the liability issues, contending that plaintiff had failed to prove a prima facie case of any Sherman Act violation and, alternatively, that it was error to direct a verdict for plaintiff. The Court of Appeals held that plaintiff had made out a prima facie case of Sherman Act violation but ordered that the judgment of this Court, "insofar as it sustained the plaintiff's motion for a directed verdict is reversed, and the action is remanded to the District Court for trial before a jury on the question of liability under Secs. 1 and 2 of the Sherman Act."*

The new trial, thus limited to the question of whether defendants had violated the Sherman Act, was placed on the calendar for November 12, 1973. At that time, plaintiff offered to waive trial by jury and the Court and the defendants acquiesced. Thereafter supplemental evidence was offered by both the plaintiff and the defendants. The record upon which this Court, acting as both trier of fact and law, will now decide this case includes such supplemental evidence together with the evidence introduced at the first trial.

B. FINDINGS OF FACT

1. The Parties, Their Transactions and the Chronology of Events

1. U. S. Steel, through its Homes Division, manufactures component parts for prefabricated houses, selling these "home packages" in various states primarily through franchised dealer-builders like the plaintiff. Its wholly-owned subsidiary, the Credit Corporation, was founded in

*452 F. 2d 1095 (6th Cir. 1971) and Judgment Entered and Issued as Mandate, June 28, 1972.

1954. The purpose behind the establishment of the Credit Corportaion was, by furnishing financial assistance to Homes Division dealer-builders unable to obtain the same sort of assistance from local commercial banks, to compete with other prefabricated house manufacturers, lumberyards, brick factories and other building material manufacturers who provide such assistance to their customers and at the same time earn a profit. (JA 953, 955-62, 1085-86, 1088-90; Lang deposition, pp. 7-8, 18; Dyas deposition, pp. 97-98, 105-106)

2. In other words, from its inception and at all relevant times thereafter, the financing services of the Credit Corporation were a "tool" intended solely to assist the Homes Division in the sale of its houses. As its president testified had been the case from its formation, "The Credit Corporation is not in the general lending business, and . . . every loan it makes is designed to aid in the distribution of [the Homes Division's] product." The Credit Corporation makes its financing available solely to franchised dealer-builders and substantially all of its loans have been conditioned upon the construction of Homes Division houses. To make it possible for the dealer-builders to construct such houses, the Credit Corporation will also finance the acquisition of improved real estate to be held for future subdivision development, the acquisition of real estate already subdivided, or the improvement and development of real estate as subdivisions. (JA 897, 900-01, 968; Answers to Plt.'s Interrs. 10 and 16)

3. The Credit Corporation's borrowers "are not prime financial risks" and its financing is not "on strictly sound banking principles" in the sense that most of its loans "are not bankable loans." If the Credit Corporation had an application for such a loan, it would generally refer the dealer-builder to a bank. The uncontradicted evidence,

however, is that most of the Credit Corporation's loans, even though not "bankable loans," have been made on the basis of sound and reasonable financial practices. When its regular program of loans has been inadequate to enable the Homes Division to attain minimum distribution levels, the Credit Corporation, to assist in achieving such levels (e.g., a target of 1800 units in 1959), has been authorized since 1958 to offer and in certain instances has offered special financing to selected dealers "without conformity [to] conventional or conservative patterns but within the boun[illegible] of prudent business judgment." Again the uncontradicted evidence is that this special financing was responsive to competition in the building industry requiring the acceptance of greater risks by prefabricators and others. (JA 897-98, 1095-98; Dyas deposition, pp. 105-08).

4. All financing by the Credit Corporation is individually negotiated with each dealer-builder in the light of his particular circumstances. The difference between the Credit Corporation's "regular" and "special" financing operations apply solely to those loans made for land acquisition and development, not loans made for the purchase or construction of houses. Of the special loans actually made to others than plaintiff, the sole evidence is that "each one [was] a little different" and was based upon the dealer's insistence that he needed assistance beyond the regular program. (JA 1279-99; Lang deposition, pp. 15-17; Dyas deposition, pp. 100-01) The record does not show the terms and conditions on which any dealer other than plaintiff was financed by the Credit Corporation, whether in its regular or special financing categories.

5. In specified circumstances, the Homes Division, in order to protect the Credit Corporation against loss in connection with higher risk financing, guaranteed or underwrote the special land financing extended to some dealer-

builders. Such guaranties were given where the risk exceeded financial limits and instead was of purely commercial character. Marginal or high-risk loans were included in the guaranty and were added or deleted as the condition of the borrower changed from time to time. The land financing extended to plaintiff was covered by such a guaranty. (JA 800-01, 898-99, 974-77, 980-82, 1268-74; Dyas deposition, pp. 107-09)

6. The plaintiff corporation is owned by Mr. A. B. Fortner, a well-known and successful real estate operator in Louisville. Even though this corporation had never previously engaged in real estate development (prior to the transactions at issue here, it had been inactive and had a deficit of $16,000), as plaintiff's interrogatory answers attest, "Mr. Fortner and his personnel, by virtue of association with other companies, . . . had considerable experience in real estate development of the type which is the subject of this law suit." In 1959, through another corporation, Iroquois Development, Inc., in which he owned a 50% interest, he had available certain land in a subdivision in Jefferson County known as Golden Meadows. Part of that land had already been fully developed and the lots had been sold to third party builders who had erected upon them some 250 houses in the $10,000 to $15,900 category. Yet another part of the subdivision had been developed with the laying of streets and installation of utility connections. The balance of the subdivision, while platted, was still undeveloped. (JA 206-11, 222, 1227, 1231, 1332-35; Answer to Dfs.' Interr. 4f; Plt.'s Proposed Finding 8)

7. Mr. Fortner's first contact with the defendants came about through his salesman, Mr. Edmundson, who advised Mr. Fortner that he had heard desirable financing was available. Upon Mr. Fortner's expressed interest and request, Mr. Edmundson arranged for a Homes Division representative to meet with Mr. Fortner in the fall of 1959. (JA 211-12, 302-303)

8. Thereafter negotiations between the parties extended over a period of essentially a year and included a variety of proposals, modifications and demands by Mr. Fortner for more favorable financing at successive stages of those negotiations. Before the end of December, 1959, there had been several meetings. Mr. Fortner had proposed to transfer from Iroquois to the plaintiff 99 lots. The existing equity was $56,000, the current indebtedness on the lots was another $56,000, and the initial estimate was that the cost of developing 96 undeveloped lots in the group would be $96,000. On this first proposal, Mr. Fortner was asking for land financing of $152,000 and he would have been contributing a 25% equity of $56,000. By this time he and his associates had attended a Homes Division seminar, had visited its plant, and were "presently assembling cost figures" on the construction of its houses (JA 306-07, 931, 1332-35)

9. At a meeting on January 6, 1960, as evidenced by one of plaintiff's exhibits, Mr. Fortner "completely changed his proposal as originally made" and "indicated that the only way he would proceed in this undertaking would be on the following basis:" (1) Credit Corporation was to finance plaintiff's acquisition from Iroquois of 155 undeveloped lots at a cost of $1,100 per ¼ acre lot or a total of $170,500 (this amounted to four times the price of $1,100 per acre paid by Iroquois five years earlier, but, as the defendants concluded, "there could be no question as to the appreciation" in the value of the land owing to the fact that Golden Meadows had then been converted from a tract of "raw land to an existing subdivision of several hundred houses"); (2) Credit Corporation was to finance development of the 155 lots at a cost of $139,500; and (3) Mr. Fortner's equity was to be an additional 31 fully developed lots

to which the parties ascribed a figure of $62,000. This proposal by Mr. Fortner, as far as the Credit Corporation was concerned, was to be "contingent upon a prior determination by him that [the Homes Division] houses can be profitably built. . . ." (JA 993, 1230-31)

10. The president of the Credit Corporation concluded that "the Fortner loan on the new basis is an extreme" and expressed concern as to whether the market would permit Mr. Fortner "to make a satisfactory return:"

> ". . . Is the product which we intend erecting there competitive, comparable, reasonable, desirable for the area? Does a sales market exist in this price range? Are business conditions such that there probably are enough qualified buyers? . . . [W]e should know, if possible, or at least have confidence that the dealer can make a satisfactory profit from the use of our product. With all our money out front, he has very little incentive to finish off a project. If his profits are not adequate or are not comparable to his prior experience, then we probably do not have a good loan. In making this statement, it is not the financial risk aspects which are referred to, but rather the fact that the loan will not produce house sales. The worst thing that can happen—and perhaps we have it at Broyhill—is an unsuccessful development. This precludes, in most cases, any other house sales in that area, because the one we have there has been unsuccessful."* (JA 1313)

*Homes Division personnel were instructed as to all loans that "the three principal factors to determine in making a land development request . . . are (1) Evidence that there is a potential market for the number of homes in question; (2) Substantial credit and financial status sufficient to warrant making the loan; (3) Ability of the dealer organization to merchandise, erect and close out the number of homes in question." (JA 1288)

11. Whether or not he was influenced by the concerns thus expressed by the defendants' representatives as to whether a project of the nature and dimensions proposed by Mr. Fortner was commercially feasible at a profit satisfactory to him, contemporaneously prepared records introduced by the plaintiff show that, by March, 1960, negotiations with Mr. Fortner had reached a point where he was expressing interest only in an arrangement along the following lines:

> "Fortner to contribute 31 completely developed lots, U. S. Steel Homes Credit Corporation to provide money to buy 155 undeveloped lots and lend development money to immediately develop 16 out of this 155. Upon attaining 50 percent prior sales of the 47 developed lots, the Credit Corporation would then be obligated to furnish development money for the balance of the entire plot at one time." (JA 1232)

12. Even as to this proposal, in view of the likely difficulty arising from the fact that the land to be developed was a part of the already established Golden Meadows subdivision, the Credit Corporation sought "some assurance from [the Homes Division] that if Fortner walks away from the program, leaving a group of developed lots, [the Homes Division] will undertake through some other dealer to complete erection and sale of U. S. Steel homes on the property in order that the Credit Corporation will not be left with an isolated group of developed lots." Because of their "confidence in both Fortner's enthusiasm to do this job and also that another dealer could be induced to pick up any balance which might remain," Homes Division representatives indicated they would be willing to accept the obligation to that extent, noting that "Should Fortner elect to do something else with the land and desire to pay us off

at any time in the process, it would not be necessary to fulfill this commitment." (JA 1232-33)

13. Except for one aspect, Mr. Fortner, his attorney, Mr. Samuel Steinfeld, and his advisor, Mr. Edward Horn of Louisville Mortgage Service Company, were well satisfied with draft documents prepared in February, 1960 by the Homes Division to implement the basic terms proposed by Mr. Fortner (i.e., the Credit Corporation to finance the acquisition and development of the approximately 155 undeveloped lots and Mr. Fortner to provide 31 developed lots at a stated value of about $62,000 as his equity). The question of the maturity of the loan, however, "seemed to result in an impasse," as recorded in another of the plaintiff's exhibits and by testimony at the trial. In accordance with the defendants' standard practice, the financing offered was limited to a one year program. Although he testified subsequently at the trial that he had been connected with a project prior to 1960 at the Valley Gardens subdivision where 519 houses had been built in one year, nevertheless at a meeting with the defendants Mr. Fortner took the position that he was "unwilling to enter into [the project] unless he can have at least a two year program." He also rejected "the possibility of reducing the loan by cutting back the number of lots. . . ." (JA 207-08, 217, 1233-34; 1970 Tr., Vol. XIV, pp. 73-82)

14. At the trial, Mr. Fortner summarized the events to this point in time as having involved "lots" of meetings where "we made offers backward and forward to each other until, uh, I asked 'em for a certain amount which, uh, if we could of got was real good to go on with the deal and get it over with. . . . [W]hen they come to our terms, why, we told 'em we would make a deal if we could and they agreed to do it." (JA 212-213, 308-313)

15. No transaction was finally effected between the parties, however, until the fall of 1960. Instead, as the

plaintiff's exhibits and testimony show, by July Mr. Robards, who was Mr. Fortner's co-partner in Iroquois, the company which owned the land, had decided that he did not wish to sell his half-interest because he felt the proposed project "looked too good for him to relinquish his interest." Mr. Fortner, therefore, agreed to sell his interest to Mr. Robards so that the latter could undertake the project with the defendants. Ultimately, however, the defendants "investigated" and found that they could not recommend Mr. Robards for financing. (JA 215-16, 1135-36, 1235-37)

16. In light of his inability to obtain financing from the defendants, Mr. Robards, by September, had again agreed to sell his interest in Iroquois. A Homes Division representative, reporting as of that time that Mr. Fortner wished to reinstate his request, stated that he had "met and discussed this program with Mr. Fortner on several occasions and am convinced of his ability, enthusiasm and sincerity. He has the building organization, sales and promotion people, and financing know-how to make this program successful." (JA 1135-36)

17. On September 19, 1960, Mr. Fortner wrote to the Homes Division asking that his previous application be reactivated on the same basis finally agreed to before Mr. Robards' change of position. He requested that his application be expedited because he had "everything else ready to go," and he stated:

> "At the time I requested financial assistance in purchasing Mr. Robard's interest and developing the lots, there was no question as to Mr. Robard's intent. Then, for some reason, he suddenly refused to sell. . . . I realize that you, Mr. Black and your Credit Corporation must feel, by now, that we can't make up our

minds and that we don't know what we want to do. This, I assure you, has never been the case with me.

"After visiting your plant and viewing your 1961 models, I am more convinced than ever that we can develop a very successful and mutually profitable program in Golden Meadows.

"We have 31 lots, fully developed, with FHA Commitments in hand on your models. We would plan a very extensive advertising and promotion campaign to get the program started as well as a continuing campaign throughout the year. Our builder, Mr. Miles, who is thoroughly experienced in tract building, has the organization for volume production and is also ready to start when we give him the go ahead." (JA 1228-30)

18. On October 28, 1960, plaintiff and the Credit Corporation finally executed a detailed loan agreement and four notes (two of which were land notes pertinent to the land financing which is the subject of this action and two of which were construction notes pertaining not to the land but to plaintiff's purchase of Homes Division houses and their erection on the land), together with a mortgage deed. The loan agreement provided that "This agreement, together with the notes and mortgage hereinabove described, constitute the entire agreement between the Borrower and Lender." (JA 44-74) While the provisions of these arrangements will be analyzed in detail following completion of the chronology of events, the loan agreement provided that plaintiff agreed to develop the undeveloped lots and to erect on each of the lots (developed and undeveloped) a Homes Division prefabricated house. (JA 47) No guaranty of any loans taken down by the plaintiff was required of Mr. Fortner or any of his other corporations.

19. The mortgage provided that upon payment of the notes "this conveyance shall thereupon become null and void" and the mortgage would be released of record. (JA 67) The notes were payable "on or before" specified dates and imposed no penalty for prepayment. Neither the instruments executed by the parties nor any other evidence indicates that the loan agreement's conditioning of the financing upon the purchase of Homes Division houses for the mortgaged lots would survive repayment of any loans. Similarly, neither the parties' agreement nor any other evidence suggests that plaintiff was required to buy houses exclusively from the Homes Division.

20. At the closing of the transaction between the parties, the Credit Corporation advanced $170,500 against the land notes to enable Mr. Fortner to buy out Mr. Robards' interest in Iroquois, leaving Mr. Fortner its sole stockholder and thereby permitting transfer of the land from Iroquois to plaintiff. Mr. Fortner testified that he could not recall how much he paid Mr. Robards for his Iroquois stock but he believed that it was at least $85,000. (JA 213-214, 314-319, 1239)

21. Following the closing, plaintiff ordered and erected five model homes, engaged with the Homes Division in cooperative advertising which included U. S. Steel's name and trademarks, and held a grand opening on March 26, 1961 to intiate its sales program. Mr. Fortner testified that after the grand opening sales "went very good." From the opening in March through July, 1961, plaintiff had obtained sales contracts from buyers for 33 houses. (JA 222-24, 231, 233-34, 460-62, 1120, 1320; Defs.' Ex. 16) Notwithstanding Mr. Fortner's statement, recorded in one of plaintiff's exhibits, that "due to serious delays in getting his United States Steel Homes program started and further delays in starting the sold houses because of extremely wet

weather all spring," by the end of July, 1961 construction of at least a dozen houses had been completed and another 14 were under construction. Homeowners began moving into the finished houses in June, 1961. (JA 238-39, 1121, 1123; Plt.'s Answer to Interr. 4d)

22. At the trial, however, Mr. Fortner and others associated with the plaintiff testified at length that from the delivery of the first Homes Division houses (the first three of which were ordered on November 14, 1960 and delivered within two weeks) they experienced problems with them, including omission of parts and delivery of defective parts which necessitated substitution or additional work, resulting in delay in completing the houses and thereafter complaints from homeowners who bought them (although plaintiff's witnesses conceded that these owner complaints were also based upon faults attributable to plaintiff's construction work). Mr. Fortner testified that the full extent of these problems was not known when he asked for further financing in connection with an additional 32 fully developed lots in the Golden Meadows subdivision. Iroquois had reacquired these 32 lots from Mr. Herman Miles, who was in charge of construction for plaintiff. The additional financing for these 32 lots was granted by the Credit Corporation on August 2, 1961 in a loan agreement and other instruments like those executed on October 28, 1960. (JA 118-34, 233-35, 238-39, 287, 490-531, 534-38, 1112-28, 1213-16)

23. Of the land financing approved at this time, Mr. Fortner had requested $24,000 to retire an existing mortgage on the 32 developed lots with the balance of more than $30,000 to be used as working capital. At a meeting with Mr. Fortner, the Credit Corporation sought a more conservative basis of financing but "Mr. Fortner's position was that he needed the financing as requested and felt that

a loan similar to that which [was] originally made was justified." After contacting Mr. Fortner's accouuting firm, the Credit Corporation representative who met with him concluded, "It is evident that until such time as the subject might realize profits from closings in volume any further working capital must either be provided by Mr. Fortner from additional injection or from the proceeds of the requested loan." He stated further, "After discussing the matter with Mr. Fortner, I can only conclude that a loan on any basis other than that which he has asked for would be unacceptable to him." (JA 1127, 1238-42) In addition, the Homes Division recommended the requested financing not only because the additional project would be of benefit to it but because the plaintiff was earning a profit on the sale of the houses and had in excess of 35 sales ahead which would permit liquidation of its indebtedness maturing in 1961. (JA 1125-26)

24. By the end of December, 1961, plaintiff had purchased in that year 55 houses for $189,002, making a cumulative total of 59 houses, all of which had been shipped by the Homes Division. The Homes Division reported early in January, 1962 that plaintiff's "accounts are current and relations with the dealer are excellent." At the same time, Mr. Fortner stated, "We are in a position where it is imperative that we sell 150 homes during 1962, which will amount to $1,800,000." (JA 1305-06, 1317, 1360)

25. In January, 1962, plaintiff ordered 4 more houses from the Homes Division, closed 4 sales with buyers and had 13 more sales awaiting closings. Plaintiff ordered one house in February, 2 in March, one in April and 3 in May, all of which were shipped by the end of May, making a grand total of 70 houses sold and shipped to plaintiff by the Homes Division (4 in 1960, 55 in 1961 and 11 in 1962). By the end of May, plaintiff had closed sales to buyers on

50 of these houses. Ultimately plaintiff sold at least 62 of the houses. (JA 1300-04; Plt.'s Answer to Interr. 3a)

26. As early as April 26, 1962, however, the Homes Division had information that Mr. Fortner was dissatisfied. At a meeting on that date, he confirmed that he was considering discontinuing his program with the Homes Division. Following this meeting, a Homes Division representative reported that Mr. Fortner, after noting that "he had priced his product extremely competitively," had stated:

> ". . . [I]t had been one series of 'minor' problems from the start, each of which, while only a few dollars in itself, continued to pile costs on top of costs to the point where his profit margin was almost nil. Along with this, he stated he had difficulties getting [FHA] clearance on buyers. The combination of product problems, loss of confidence by his sales group and difficulties in getting [FHA] buyer approval made it impossible for him to carry on the volume program he had originally anticipated. Volume is his big need to maintain the prices he has established. He stated that, while we have been prompt, in most cases, in shipping replacement materials or correcting mistakes, still and all this was not the answer. . . . Fortner was quite frank in stating that some of the problems are of their own making—that they are not entirely blameless." (JA 1107, 1109-10)

27. Although Mr. Fortner's program had called for house sales in the $11,000 to $13,000 price range, the Homes Division representative reported:

> "The most important item in our conversation was the fact that he had become convinced that his salvation lies in a $10,000 house and he is going to have this whether it is with us or with someone else. He indicated a willingness to 'let bygones be bygones' if we could furnish such a product, even if it involved special pricing in the home package from us."*

The report concluded that "we are in serious danger of losing him" and that, while much of Mr. Fortner's trouble had been caused by his own construction methods, if he would present specific figures on extra costs caused by Homes Division mistakes "we should attempt to make an equitable settlement." The Homes Division representative also "promised [Mr. Fortner] to do whatever I can to correct the problems . . . outlined." (JA 1107-11)

28. On May 4, 1962, eight days after the April 26 meeting with Mr. Fortner, the same Homes Division representative called him to arrange visits by "each of the vendor representatives whose products [in the Homes Division house packages] apparently were in question." He advised Mr. Fortner "that we intended to vigorously follow up on these complaints and intended to eliminate these problems if at all possible. I also reminded him that, as soon as he was able to gather the specific costs and information concerning his complaints, we would like to take a look at this." (JA 1266-67)

29. On May 11, 1962, Mr. Fortner's attorneys wrote to the Homes Division that "it is incumbent that arrangements be made to compensate Fortner Enterprises for the damage it has sustained in the past and can reasonably expect to sustain in the future due to these defective products." They asked that they be contacted "in order that

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*Notwithstanding his claim that the defects in the Homes Division houses destroyed the reputation of his subdivision, as of the time that Mr. Fortner was proposing at this April 26, 1962 meeting that the Homes Division furnish a cheaper house to permit him to sell it at $10,000, plaintiff had completed construction of 54 Homes Division houses, of which 50 had been sold and occupied. (JA 554-57; Answers to Defs.' Interrs. 3a, 4d)

we may avoid the necessity of costly litigation." (JA 1133-34) On May 16, the Homes Division's counsel responded:

> "I am advised that the Homes Division is currently making diligent efforts to satisfactorily resolve any outstanding claims of Fortner Enterprises. I understand that Mr. A. B. Fortner has been requested to develop information regarding the nature of his claims so that Mr. Stanley Mack, Manager-Dealer Sales, of the Homes Division, can sit down with him and endeavor to settle the matter in a mutually satisfactory manner. Frankly, while such claims are in the process of development and discussion with a view to resolution in the normal course of business, it appears to us to be entirely unnecessary, unwarranted, premature, and needlessly expensive to have the matter handled by legal representatives of the parties. Accordingly, if you concur, I would suggest that the anticipated meeting between Mr. Fortner and Mr. Mack, which was delayed by your letter, be rescheduled." (Defs.' Ex. 14)

Thereafter Homes Division representatives and its Louisville counsel met with Mr. Fortner and his attorneys to obtain a list of specific claims upon which a settlement might be negotiated, but they were unsuccessful in obtaining such a list even though it had been requested as early as April 26, as previously noted. (JA 1110, 1260)

30. According to affidavits of Mr. Fortner, however, "prior to the filing of this action" he arranged a meeting with representatives of the defendants at his attorneys' offices on June 5, 1962 "to work out an amicable solution to the problems that were caused by the defective condition of the homes being furnished." Mr. Fortner states that he explained that the alleged defects had caused the reputation of his subdivision to deteriorate and it was "practically impossible" to sell the Homes Division houses* and therefore plaintiff could not continue to construct them. The defendants were told that their loan could be "completely repaid if they would delete from the loan agreement the requiremnt that it was necessary to erect on each lot a prefabricated dwelling house manufactured by the . . . Homes Division . . ." and would permit the Credit Corporation's financing to be used to construct conventional homes. Mr. Fortner states that defendants refused. (Fortner Aff., Sup. Ct. Appendix, pp. 291a-294a)

31. At the trial, Mr. Fortner testified to essentially the same effect. He added, however, that at the meeting he told the defendants that "we were broke at the time—wasn't behind with nobody, but we were out of cash. . . ." (JA 262) One of plaintiff's exhibits shows that at the meeting, on June 5, 1962, Mr. Fortner and his attorneys

> ". . . again declined to furnish a specific list of claims, stating that it is impossible to negotiate a settlement because they expect many more complaints from home owners in the future. They indicated that they might waive their claims if the Credit Corporation would modify its loan agreements to permit the building of conventional houses. . . ."

The evidence is undisputed that at this meeting defendants, while refusing to acquiesce in the plaintiff's use of their financing to build any houses other than those of the Homes Division, told Mr. Fortner that he was free to re-finance and build any other houses upon paying off the loans owing to the Credit Corporation. At this point in the meeting, according to plaintiff's exhibit, Mr. Fortner's attorneys

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*The evidence is uncontradicated, however, that by May, 1962, plaintiff had completed construction of 56 houses, including the 4 model houses, and by the end of that month plaintiff had closed sales on 50 of them, at least 12 more being sold thereafter. (JA 1300; Answers to Defs.' Interrs. 3a, 4d)

"declared that no further purpose could be served by negotiations and that they 'would see [the defendants] in court.'" (JA 995, 1261-62; 1970 Tr., Vol. XIII, pp. 57, 110-111, 113-114)

32. Following the meeting of June 5, 1962, as plaintiff told the Sixth Circuit in appealing from the grant of summary judgment (Br., p. 18), "Upon the Credit Corporation's refusal to delete from the loan agreements the requirement that Homes Division homes be purchased and built, this antitrust suit was filed and no further payments were made." In the meantime, however, even though plaintiff's accounts with the defendants were current (although interest was delinquent one month and one note was past its maturity of June 1), in view of Mr. Fortner's statement that plaintiff was "broke" and without cash, the Credit Corporation decided to give notice to Mr. Fortner that it was invoking its rights under the loan agreement to audit plaintiff's books but, pending the audit, to withhold any action at that time to enforce payment of its outstanding loans (JA 1258-63, 1300-01)

33. On June 19, 1962, Ernst & Ernst reviewed with the Credit Corporation its preliminary report, showing that plaintiff had realized a net profit of $6,000 from its project (Ernst & Ernst was unable to identify an additional $9,000 of expenses charged against profits) and a gross profit on 51 houses sold and closed of slightly more than $1,000 per house. The report confirmed, however, that plaintiff was insolvent by some $10,000 (as compared with its original deficit of $16,000). (JA 1248-58) It was not until July 10, 1962, that the Credit Corporation decided to forward a letter to plaintiff demanding payment and accompanied by the recently completed Ernst & Ernst audit. That demand letter which spelled out plaintiff's "failure to pay the outstanding balance on Construction Note No. 1 on or before maturity and . . . further failure to pay interest on the Land Notes evidencing both loans," was not mailed to plaintiff until at least July 12, 1962. (JA 75-76, 1247-48)

2. Defendants Did Not Promise or Give Plaintiff 100% Land Financing

34. The factual keystone of plaintiff's claim, repeated at all stages of this litigation and reiterated now in its proposed findings, has been that the land financing agreed to by the Credit Corporation "amounted to 100% of Fortner Enterprises' *cost* to acquire the land in question and to develop it . . ." (Plt's Proposed Finding 26). Mr. Fortner consistently testified that the defendants' financing was to cover all costs incurred by plaintiff in acquiring the total of 219 lots and in developing certain of the approximately 155 undeveloped lots in that total, and there is no evidence contrary to his word. Equally consistently, however, the plaintiff has at all times characterized this financing as "100% land acquisition and development loans" both in questioning its witnesses and in its papers filed with the various courts which have ruled on this case.*

35. In the context of defendants' summary judgment motion and, subsequently, their argument that a verdict should have been directed for them at the first trial (a context in which, as a matter of law, the evidence had to be read in the light most favorable to plaintiff and all reasonable inferences drawn in its favor), defendants did not dispute plaintiff's characterization of Mr. Fortner's testimony. At the second trial, however, plaintiff called several witnesses whom it presented as expert in the sphere of real estate financing. Each of those witnesses made it clear beyond cavil that in determining what percentage relation-

*The Court of Appeals, analyzing the record of the first trial, stated as to the loan agreements: "The land loan equaled 100% of the *cost* of the land acquisition and development." (452 F. 2d at 1098)

ship a land loan bears to the underlying security it is the value of the land acquired and developed which is controlling, not necessarily the cost incurred in so acquiring and developing the land.** There is no evidence to the contrary, and the cited testimony on this point is wholly consistent with that of plaintiff's witnesses who testified at the first trial. (JA 824, 836, 1004-05; 1973 Tr., pp. 28, 32-33, 53-54, 61-62, 95-96, 114-15, 152, 158, 160-61, 164-65).

36. In light of this basic real estate financing concept (i.e., that loan "percentage" is determined by the value of security), the evidence is unequivocal that plaintiff did not obtain "100% land acquisition and development loans" from defendants even if every cent expended by or on behalf of plaintiff in connection with its acquisition of the 219 lots and its undertaking development of some of the approximately 155 undeveloped lots in that total had come from the Credit Corporation. The October 28, 1960 loan agreement committed the Credit Corporation to lend to plaintiff a total sum of $2,055,300 to be advanced not at the closing or any other single time but according to specified progress provisions geared to particular events and work completed in connection with the overall project (JA 45-46, 50-56). This total sum, however, was broken down

**Admittedly cost determined by the sales price contemporaneously negotiated in arm's length bargaining by an unrelated buyer and seller, each interested only in achieving the best price for himself, will often be a sound indication of value, if not essentially identical. As here, however, where the buyer (Portner Enterprises) and the seller (Iroquois) are related through wholly or partially common ownership, alien factors may intrude and an arm's length transaction reflecting an objective market equivalent to the price paid can not be merely assumed. The fact that land value may differ from its cost, particularly where the buyer and seller were related and did not deal at arm's length, was conceded by at least one of the plaintiff's real estate financing witnesses (1973 Tr., pp. 53-54), and the record is barren of any evidence even suggesting that the costs incurred by plaintiff to acquire and develop the land were in fact the same as the fair market value of the lots so acquired and developed. To the contrary, as treated in the succeeding findings, the sole evidence is completely to the contrary and establishes that in both loan transactions value exceeded the costs incurred by plaintiff so that in fact it did not obtain 100% land financing from the Credit Corporation.

into two separate land notes (aggregating $319,920) and two separate Construction Notes (aggregating $1,735,380).

37. Land Note No. 1 was in the amount of $88,000. (JA 45, 68-69) The loan agreement provided that at the closing $63,325 was to be advanced to plaintiff but another $10,275 was to be deducted immediately from this portion of the land financing and paid to the Credit Corporation in payment of the service fee chargeable to plaintiff on the entire sum covered by the overall loan agreement. (JA 51) More specifically, the plaintiff agreed to pay and was charged a service fee of one-half of one percent of the entire loan commitment (both land and construction financing commitments) of $2,055,300 (or $10,275)*, and the full amount of that service fee was deducted from the proceeds of Land Note 1 without ever being received by the plaintiff.

38. Land Note No. 2 was in the amount of $231,920. (JA 45-46, 70-72) The loan agreement provided that at the closing $107,175 of this sum was to be advanced to the plaintiff. (JA 52-53) Therefore, even disregarding for the moment the fact that plaintiff was allowed to take at the closing only a total of $17,500 against Land Notes 1 and 2, the Credit Corporation was committed even ultimately to land plaintiff over the entire term of the agreement at most only $309,645, rather than the $319,920 face amount of those notes. In effect, then, even if plaintiff had received the full land financing at one time, the land loan was discounted more than 3% so that plaintiff could obtain at most only 96.9% of the land financing commitment undertaken by the Credit Corporation because the land loan bore the entire service fee. Even if the value of the land had

*Part A, §2] of the loan agreement provided that plaintiff agreed "To pay to the Lender as hereinafter provided a Service Fee of one-half of on per centum (½ of 1%) of the *total principal amount of the promissory notes* hereinabove referred to." (JA 48)

not exceeded the cost to plaintiff of acquiring and developing it and even if the full amount of the land financing commitment had been advanced to plaintiff, therefore, plaintiff would have had not a 100% but 96.9% land loan.

39. As provided in the loan agreement, plaintiff's exhibits show that only the amount of $170,500 was in fact disbursed at the closing to permit the transfer to plaintiff from Mr. Fortner's Iroquois company of the 31 fully developed and appropriately 155 undeveloped lots. (JA 1239, 1259) As previously found (Finding 9), plaintiff's exhibits establish that from the time that Mr. Fortner, in January, 1960, first proposed the transfer to plaintiff of approximately 155 undelevoped and 31 fully developed lots the parties had accepted the value of the latter as $2,000 per lot, or a total of $62,000, which was to represent Mr. Fortner's equity contribution to the project. They had also agreed that the approximately 155 undevloped lots were to be transferred at a cost of about $1,100 per lot, or a total of $170,500. Even as late as June, 1962, when the parties had all but reached the breaking point, the defendants were still conceding in their internal communications that the $170,500 paid by plaintiff to Iroquois in fact "represented a reasonable value of $1,100 per lot" for the undeveloped lots. (JA 1230-31, 1259)

40. In sumary, while it is true, as Mr. Fortner testified, that the Credit Corporation advanced to plaintiff the full "100% of Fortner Enterprises' *cost* to acquire the land" covered by the October 28, 1960 financing, it is at the same time true that the amount thus loaned by the Credit Corporation amounted to only 73% of the $232,500 value of the land thus acquired.*

*In fact, the Credit Corporation never advanced all of the remaining balance of the land financing commitment undertaken in the October 28, 1960 agreement. (JA 1258-59) The balance of that commitment, if taken down by the plaintiff, would have been $139,145. (JA 51, 53)

(Footnote continued on following page)

41. Turning now to the August 2, 1961 loan agreement, it committed the Credit Corporation to lead to plaintiff a total sum of $465,350, again to be advanced not at any single time but according to specified progress provisions geared to particular events and work completed in connection with the 32 fully developed lots added to the project. (JA 106-118) This total sum, however, was broken down into a Land Note for $59,000, a Construction Note for $403,400, and a Collateral Note for $2,950. (JA 107-08, 119-123)

42. Like the first agreement, the second loan agreement provided that at the closing $2,312 was to be immediately deducted from the land financing and paid to the Credit Corporation in payment of the service fee chargeable to plaintiff on the entire sum covered by both the land and construction financing. (JA 112) More specifically, the plaintiff agreed to pay and was charged a service fee of one-half of one percent of the loan commitment (both land and construction) of $462,400 (or $2,312)*, and the full amount of that service fee was immediately deducted against the proceeds of the Land Note.

43. In effect, then, this second land loan was discounted 4% so that the plaintiff obtained the proceeds and benefits of only $56,688 or 96% of the land financing commitment undertaken by the Credit Corporation, because the land

Assuming that this amount (intended to cover progress payments for development of the undeveloped lots) had been advanced with the $170,500 in fact advanced for acquisition of the lots covered by this first financing, then the Credit Corporation would have loaned plaintiff a total of $309,645. The $232,500 value of the lots as acquired, however, would have been enhanced by at least the cost of the development (*cf.*, 1973 Tr., p. 167) of the approximately 155 undeveloped lots or, on the assumption made here, by $139,145. The ratio of the amount hypothetically advanced to plaintiff, therefore, would have been $309,645 against the enhanced value of the land in the amount of $371,645 ($139,145 plus $232,500). This would have been an 83% land acquisition and development loan, not 100%.

*Part A, §2h of the second loan agreement provided that plaintiff agreed "To pay to the Lender as hereinabove provided a Service Fee of one-half of one per centum (½ of 1%) *of the total aggregate amount of the Land Note and the Construction Note.*" (JA 110)

loan bore the entire service fee. Even if the value of the 32 developed lots had not exceeded the cost to plaintiff of acquiring them, therefore, plaintiff would have had only a 96% land loan, not a 100% land loan.

44. In fact, however, plaintiff's exhibits establish that the value of the 32 developed lots transferred to plaintiff was in excess of the $56,688 advanced by the Credit Corporation to or for the benefit of plaintiff in connection with its acquisition of those lots. In the year before the August 2, 1961 financing, the same 32 lots had been the subject of a sales contract at a price of $68,000. At the time of that financing, the FHA lot valuation placed upon them averaged $2,200 per lot or a total value of approximately $70,400. (1122, 1239, 1241-42) Patently the land loan made by the Credit Corporation to the plaintiff in connection with the August 2, 1961 financing commitment amounted to approximately 80% of the value of the developed lots acquired and put up as security, not 100%.

45. While Mr. Fortner, as noted earlier, testified that the Credit Corporation advanced plaintiff 100% of its cost of acquiring all of the financed lots, his testimony also supports and compels the conclusion that the land loans were not 100% loans because the value of the 219 lots exceeded their cost to plaintiff. When he was questioned (JA 304-307) about his original proposal, made late in 1959, for a project of 99 lots and houses in connection with which he was to contribute a land equity of some $56,000 or 25% (see Finding 8), he testified as follows:

> "Q. . . . [Y]ou have represented at least according to this report that you would put $55,950 of your equity in the land. . . . Do you recall any discussion along that line at that time? . . . A. (Interrupting) Somewhere along the line we had some equity. We had two hundred nineteen lots.

> "Q. Well, but I'll get to that in a moment, but ultimately the two hundred nineteen lots were bought and paid for with borrowed money, weren't they? A. *Most of it, yes.*
>
> "Q. *Not all of it?* A. *Well, most of it.*" (JA 306)

In later testimony, Mr. Fortner again confirmed that the value of the land exceeded its cost to plaintiff:

> "Q. And you would risk no money of your own or your corporation? A. *We were risking* two years of time and *our lots* and a lot of things.
>
> "Q. Well now, all right; I'm asking you about money; would you risk any money? A. Not cash.
>
> "Q. Right; and of course the lots you say you are risking are lots that you purchased from Iroquois Developers with borrowed money; isn't that right? . . . A. Yes.
>
> "Q. So that it wasn't your money invested in the lots, but it was the Steel Corporation's? A. *The lots was worth more than that,* but the appraiser appraised 'em for more than that.
>
> "Q. . . . Now, your risk on the land was nothing because you had borrowed all of the money to buy and develop the land, hadn't you? A. No, Sir.
>
> "Q. You had not? A. *Not all of the value.*" (JA 330-31)

Moreover, in calculating his sales price, Mr. Fortner ascribed a value of $2,000 to each lot (JA 607). For the entire 219 lots, this would have been a total value of $438,000. The Credit Corporation's aggregate land loan commitment (after deducting its fees) on both loan agreements was only $366,333.

3. The Record Fails to Show That Plaintiff Was Given Unique Financing (Whether Or Not 100%), Allegedly Cheaper Or More Favorable Than Available From Other Sources

46. To support its contentions that defendants' financing was uniquely favorable and unavailable in Louisville at the time, plaintiff introduced the testimony of several Louisville businessmen acquainted with real estate financing and of Prof. John T. Masten of the University of Georgia (whose academic responsibilities are in the field of banking and who had taught at the University of Kentucky from 1948 to 1967). Each of these witnesses, however, was asked only whether other lenders had offered (or, in the case of Prof. Masten, would, in his opinion, have been likely to offer) "100% land acquisition and development loans" or loans equal to 100% of the cost of acquiring and developing the land. (JA 221, 821, 824, 868-69, 1004; 1973 Tr., pp. 31-32, 37-39, 143-45, 159, 162-63)

47. None of these witnesses was told or understood that the loans to plaintiff were not 100% of the value of the land and that the value exceeded the cost of acquiring and developing the land which secured the loans. For example, Prof. Masten testified that, while clearly a borrower would have an equity if his cost of acquisition was not the full value of the land, he did not know that this was the case with the loans to plaintiff. (1973 Tr., pp. 61-62). Similarly, Mr. Charles C. Will, Sr., President of Portland Federal Savings & Loan Association, testified that "my understanding [of the financing given to plaintiff] was it was a land acquisition and development loan, a hundred percent value. . . ." (Id., p. 164)

48. Even limiting consideration for the moment to just this one element from among all the terms and conditions which governed the loans to plaintiff—the percentage relationship which the loans bore to the value of the security

(the land)—neither the testimony of plaintiff's witnesses nor any other evidence establishes what percentage loans were available, generally or in the particular circumstances of any specific loan, on property in Louisville at the time. At most the plaintiff's witnesses stated only that they did not know of any 100% loans available through "normal or conventional" financing sources, but they did not preclude the possibility that even 100% loans (let alone comparably attractive loans when all other terms and conditions are considered) were available. Similarly, plaintiff does not even claim that any witness addressed himself to the availability or unavailability of loans in amounts other than 100% of the value of the land (e.g., 90%, 80%, or 70%). (Plt.'s Proposed Findings 28-32, 44)

49. Mr. Fortner's testimony was that he had not directly investigated the terms available from other sources and that his claim that 100% loans were unavailable was limited just to local "conventional or normal lending sources," otherwise undefined by him but not including house suppliers competing with the Homes Division:

> "Q. . . . [W]ere you familiar with source of financing, uh, in particular, in the Louisville and Jefferson County area in 1960? A. Yes.
>
> "Q. The one hundred percent financing for land acquisition and development which was offered by the Credit Corporation, as you have told us about, was that available, to your knowledge, in 1960 from any other conventional or normal lending sources? A. Nowhere, to my knowledge." (JA 221)
>
> • • •
>
> "Q. I will ask you . . . where you sought other financing, if you did in fact seek it, prior to making your transaction with the Credit Corporation in Octo-

ber of [1960]? . . . A. We didn't try to get any better financing than that. . . .

"Q. So, you really then made no inquiry in the local market? A. Not on that deal. We had been fooling with the local market for years; we knew what it was. . . .

"Q. . . . [Y]ou didn't shop around at all, did you? A. No reason for it." (JA 355-357)

50. Plaintiff's witness, Mr. Paul F. Semonin, Jr., of the Paul Semonin Company, testified only that he thought he was familiar with the types of financing available and that 100% loans were "not usually" available from normal or conventional lending sources:

"Q. All right; during the period 1959, 1960 and 1961, as a result of your relationship with various subdivision developments, were you and are you familiar with the types of financing available to developers and buildings [sic] during those years, that period of time? A. Yes, I think I am.

"Q. All right sir; would you tell the jury whether or not during that period of time there was any what we have called one hundred per cent land acquisition and development loans available from normal or conventional lending sources? A. Uh, not usually, there was not, no." (JA 868-69)

Mr. Charles W. Henney, plaintiff's witness from the Prudential Insurance Company, testified solely that its Louisville office had not made any land loans in the 1959-1962 period and thereafter none in excess of 75% of "market value." He gave no testimony as to what percentage loans were available from other sources. (JA 1004)

51. The testimony of plaintiff's witness, Mr. Horn, the President of Louisville Mortgage Service Company, was

not only similarly qualified and subject to inferences adverse to plaintiff's contentions, but he also testified that land loans without any security were available at least to other builders, if not the plaintiff:

"Q. Would you tell the jury if one hundred per cent land acquisition and development loans were available in this area during that period of time? A. To my knowledge, they were not. I believe if they had been, I would have known about it, because we had taken such an active part in the financing and construction of homes that I believe I would have known about it, but to my knowledge, there were none available at that time.

"Q. All right; were there any companies, to your knowledge, willing to make such loans in 1959, 1960 and 1961? A. Uh, a number of developers secured development loans through the commercial banks. In these cases, they were more of a loan on the credit of the developer rather than on the security that was offered. By the security, I mean the land that was to be developed. That is what we refer to in our industry as a line of credit only, where a man has a line of credit with a bank, and that line of credit is given him on the basis of the financial strength of his financial statement rather than on the basis of security that is offered for the loan.

"Q. I see. Assuming that, uh, a corporation had a $16,000 deficit and that it had land potential available in the period of 1959, 1960 and '61, to your knowledge, would a corporation with a deficit of that nature have been able to obtain a one hundred per cent land acquisition and development loan—uh, money, rather, from any normal lending institution or sources? A. Well, of course, you'd have to study the situation to

see what caused the deficit. Some deficits are a book transaction and others are not, but if it was an operating deficit, obviously coming from the operation of his business, I would not consider the loan in the first place.

"Q. Any loans to corporations during this period of time which, uh, which corporations had a deficit or were of low capital, would these require personal guaranties by the stockholders if loans were to be made to them? A. The matter of personal guaranty is not a set procedure. In most cases, uh, I can only, of course, attest to our operation—in most cases, if we have a builder who has a definite performance behind him that we think is good, we may overlook the—we may not require the personal endorsement. In most cases, if we think that the builder does not have a sufficient record, or there is something about the project that, uh, is a little bit questionable, we would require person endorsement." (JA 821-22)

* * *

"Q. . . . Well, you qualified that by adding, 'to your knowledge,' didn't you? A. That's right. You can't make a categorical statement that there weren't any available because I don't think anyone could make a statement like that. We don't know what every company is doing. We know generally, by virtue of what our customers tell us and that's how we learn these things." (JA 839)

52. Plaintiff's witness, Mr. Ralph H. Logan, President of the Southern Savings & Loan Association, testified that his association made no land acquisition and development loans in the period 1959 through 1961. Questioned as to whether he knew of any "conventional or normal type

lending source that was doing business in the Louisville and Jefferson County, Kentucky area" which was making 100% land loans at that time, he answered:

> "Well, I could only speak primarily for Building & Loans and, uh, I was—I am unaware of any Building & Loan that would have made a hundred percent land acquisition loan in those days, and from just general knowledge, I didn't know anybody that was."

He could not, however, identify any lenders who were making any kind of land acquisition and development loans at that time, let alone state what percentage loans they offered. Similarly, Mr. Logan had no knowledge of the land financing terms offered then by competitors of the Homes Division (National Homes, Scholz Homes, Kingsbury Homes, Harnischfaeger Homes, Swift Homes, Inland Homes, Tru-Bilt Homes, Richmond Homes, Jim Walters Homes and Pease Wood Work Co.), who were shipping prefab houses into Louisville at the time. (JA 839140(1278; 1970 Tr., pp. 142, 145, 148, 152-54)

53. Mr. Will, of Portland Federal, testified that his Savings & Loan Association had made no land acquisition and development loans until "probably in the latter part of 1961 or 1962" (the second loan agreement with plaintiff was executed on August 2, 1961). He stated that his experience and knowledge of the land loan market "more or less" began at that time. As to whether any 100% land acquisition and development loans were being made in the Louisville area during the 1959-1961 period, he answered, "I had no knowledge at that time of any." Like Mr. Logan, Mr. Will lacked any knowledge of the land financing terms offered by the prefabricated home competitors of the Homes Division. (1973 Tr., pp. 160, 162-63, 167-69, 170-71)

54. Prof. Masten did not purport to know what land loans had actually been available in the Louisville area at the time of the loan agreements with plaintiff:

> "Q. . . . [W]ould you state whether or not you were familiar at that time and are familiar now, uh, with the types of land acquisition and development loans, uh, that were made or available in Kentucky, including the Louisville and Jefferson County area? A. Well, I have a general knowledge of bank, or lending principles, probably particular[ly] banks, but I would also have a general knowledge of the lending policies of other non-bank lenders. I would not necessarily know the specific details of each loan, but in general, I am aware of the principles that lenders would follow in making loans of this type." (1973 Tr., pp. 30-31)

55. Prof. Masten was then asked to assume that the October 28, 1960 loan agreement "represented 100% of the funds required to acquire . . . and to develop that land," plaintiff having a $16,000 deficit and no personal guaranty being required, and the question was put to him:

> ". . . [*D*]*o you have an opinion* uh, as to whether or not such a loan, under those circumstances, was available to the Fortner Enterprises, Inc., uh, from any other lending source, uh, during the period of time with which we are concerned, uh, 1959 through 1961? A. *In my opinion,* a loan with this degree of risk, would not have been available from, let's call them the normal channels of credit, for development and construction lending. In other words, this was a very unique kind of loan; it was not the kind of loan that you would normally find in the housing credit market at that time." (1973 Tr., pp. 31-32)

56. Prof. Masten testified that he could not state what percentage loans in relation to the value of the land financed were being offered in the 1959-1961 period, whether by commerical banks, savings and loan associations, mortgage bankers, insurance companies, pension and endowment funds or other sources of credit. (1973 Tr., pp. 90-91) In fact, he could not identify the lenders who offered financing for land acquisition in Louisville in that period. (Id., pp. 88-89) Like Messrs. Logan and Will, Prof. Masten did not know what land financing terms and conditions were available from the prefab competitors of the Homes Division. (Id., pp. 109-110)

57. Instead, it was Prof. Masten's opinion, reiterated throughout his testimony, that the financing of plaintiff was not a prudent loan for a conventional lender "in that such a lender would not have made a 100% loan during the period of 1959 *through 1965* became that was a period of 'great price stability.'" (1973 Tr., pp. 32-33, 36, 55, 64-67, 73-74) For example, he testified that the loan was "unique":

> "First of all, it was a loan for 100% of the land acquisition and development; that immediately is unique, particularly for the period of time in question. . . . [A] prudent lender would have been unwilling to have made a loan involving a 100% risk. This was not a period of inflation; in fact, it was a period of great price stability. There was very little change in the wholesale price index during this period of time so that the lender couldn't have said, 'All right, I'll make the loan now because I expect the value of this property to appreciate.'" (Id., pp. 32-33)

58. At the same time, Prof. Masten conceded the subjective elements inherent in land valuation, noting that

each lender, in placing a value upon land to be developed, would have his own standards and that "any lender would try to make some estimate of what he anticipated would happen to the economy" (he also pointed to a variety of other factors which would affect a lender's evaluation).* (1973 Tr., pp. 55-59, 69) Moreover, where appreciation is expected or inflation likely, he testified, 100% loans would become more common and even prudent lenders would be more likely to make such loans. (Id., pp. 67-68) Thus, he stated, he did not mean that a prudent lender would never make a 100% land loan (Id., p. 63):

> "In fact, that would not have been an uncommon type of loan in the last five or six years because we have had an annual rate of inflation that has carried values upward, so I think what is prudent at one time may not be prudent at another time."

59. The "All Commodities" Index of the Bureau of Labor Statistics' Wholesale Price Index was the basis for Prof. Masten's view that the 1959-1961 period, when the loan agreements with plaintiff were negotiated and executed, was one of great price stability when lenders could not expect inflation or appreciation. He testified that this index does not include the value of land; that it is comprised of "considerably over a thousand" commodities falling into such major categories as agricultural products, textiles, chemicals, metals, machinery, fuels, hides, and skins; that a particular element or even whole categories can move contrary to the trend of the overall index, as the broad chemical category had done; and that the index is a "national average" and, therefore, he could not say that

*As earlier found (Finding 6), the land financed by defendants was part of the Golden Meadow subdivision which had been partially developed and where some 250 homes had been previously built. Prof. Masten testified that such circumstances would prompt a lender to assume greater risk by offering more liberal terms. (1973 Tr., pp. 56-58)

it was in accord with any specific indices for the Louisville area. (1973 Tr., pp. 73, 76-79; Defs.' Ex. 501)

60. Apart from these problems inherent in concluding that the "All Commodities" index has any meaning in determining either past or likely trends in the movement of Louisville land values, Prof. Masten did not suggest that credit sources engaged in making land loans follow this or any other index in making their estimates of what might happen to land values, either generally or in a particular locality. Nevertheless, in support of his opinion that 1959 through 1965 was a period of "great price stability" that would have inhibited any prudent lender from offering 100% land financing, he testified that beginning with the year 1960 the "All Commodities" index was stable. At the same time, on cross-examination, he admitted that from 1953 through 1960 this same index increased each and every year without exception. (1973 Tr., pp. 73, 76) For both of those periods, the index was as follows (Defs.' Ex. 501):

1960	94.9	1953	87.4
1961	94.5	1954	87.6
1962	94.8	1955	87.8
1963	94.5	1956	90.7
1964	94.7	1957	93.3
1965	96.6	1958	94.6
1966	99.8	1959	94.8
1967	100.0	1960	94.9

61. Even assuming that the "All Commodities" index has relevance for the use to which Prof. Masten put it, he offered no explanation and none is apparent as to why in 1959 and 1960 (when the Credit Corporation negotiated and executed the first loan agreement) prudent lenders, if they looked to this index, would not have been likely at that time to expect a continuation of the marked upward

trend which had continued without interruption for at least the preceding seven years. In fact, on the figures cited by Prof. Masten, neither a prudent lender nor any other observer could have seen until some time in 1962 (when the annual figures for 1961 would first become available) or later that the steady upward trend had been broken.*

62. Prof. Masten conceded that he knew of no lenders making or offering land loans in the Louisville area in 1960 and 1961 who made their terms less favorable to borrowers than in the past because they anticipated that price levels would be stable or that there would be a downturn in the inflationary trend. (1973 Tr., p. 88) He also admitted that, "Over time, there has been a tendency to liberalize lending conditions in anticipation of inflation of property" rather than just the overall economy. (Id., p. 55) More importantly, while he was more equivocal than knowledgeable practicing real estate witnesses who testified that from 1959 through 1961 in Louisville ". . . financing was easy; money was available . . .,"* Prof.

*Prof. Masten testified that using monthly figures "would make really very little difference because the annual is compiled by taking an average of the monthly indexes" and that a prudent businessman would not base any judgment on reports for as little as three months. Moreover, he stated that there is a time lag of probably a month and a half between publication and the end of the month reported in the monthly indices. (1973 Tr., pp. 72, 80) He also admitted that the "Home Ownership" Index of the Bureau of Labor Statistics' Consumer Price Index, which he considered to be competently assembled, went up without interruption each year from 1953 through 1961. (Id., pp. 81-82, 86) That index shows the following (Defs.' Ex. 502):

1953	90.1	1958	100.4
1954	91.7	1959	101.4
1955	92.6	1960	103.7
1956	94.1	1961	104.4
1957	98.2		

As shown, the indices increased on the average at a faster rate for the years 1957 through 1960 (2.4% annually) than for the earlier years (1.3% annually).

*1970 Tr., Vol. XIV, pp. 97, 103

Masten testified that "This was not a period of particularly tight money" and in his opinion land lenders would not have been imposing onerous terms such as discounting upon borrowers. (Id., pp. 92-93)

63. Prof. Masten made no claim that lenders outside the areas of Louisville and Kentucky were not making 100% land loans in the 1959-1961 period, and as to the Louisville and Kentucky areas he was merely "unaware of any loans of that character being made at that time." (1973 Tr., p. 64) More specifically, he testified that from 1962 to 1968 in the Louisville area he had "heard of hundred percent loans, but most of the loans I have heard of about this character have been more recent," and it was his impression that they had been made after 1965. (Id., pp. 65-66)

64. In the final analysis, Prof. Masten's opinion that a prudent lender (he included mortgage companies or mortgage bankers, savings and loan associations, commercial banks, trust companies, insurance companies, pension and endowment funds, and credit unions in that definition) would not have made a 100% land loan from 1959 through 1965 must be evaluated against the objective facts of record. Notwithstanding any price stability reflected for that period in the "All Commodities" Wholesale Price Index, by at least 1962 mortgage companies and bankers and building and loan or savings and loan associations located in Louisville were offering 100% land acquisition and development loans, as the Court of Appeals noted upon its review of the first trial record.*

65. Not merely witnesses for the defendants but plaintiff's own witness, Mr. Horn of the Louisville Mortgage Service Company testified that his company, other mortgage companies (including Pence Mortgage Company and

*". . . [T]here was testimony at trial that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis." (432 F. 2d at 1101)

Kentucky Mortgage Company), as well as building and loan associations, all located in Louisville, were compelled to give 100% land financing in response to what other prefabricated house manufacturers or their affiliates competing with the defendants were offering as well as what he understood (however mistakenly) the Credit Corporation had given plaintiff. With reference to the time element, he unequivocally testified that his records showed that by July, 1962 his company, the largest mortgage company in Louisville, had negotiated and executed its first 100% land financing with the Associated Developers. (JA 421-22, 839-44; 1970 Tr., pp. 113, 119)

66. In its review of the first trial, the Court of Appeals stated:

> ". . . [W]hile the plaintiff offered some evidence that 100% financing was not generally available on the Louisville market at the time of its financing with the Credit Corporation, it must be conceded that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors . . . include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity and terms of repayment." (452 F. 2d at 1101)

Plaintiff's witnesses, of course, agreed with this fundamental concept (i.e., that in determining whether one loan is cheaper or more favorable to the borrower than another all terms and conditions must be evaluated),* and Messrs. Horn, Logan, and Will testified that lenders can compete

*For example, a 100% loan against security valued at $1,000 but discounted 10% (i.e., reducing the amount actually taken by the borrower to $900) and at 10% interest repayable in 12 equal monthly installments is not cheaper or more attractive than a 90% loan against the same security, without discount or service fee and at 5% interest repayable in the full amount of the note with a single, lump sum payment at the end of 12 months.

with each other even if they do not offer loans of the same percentage to security by varying some or all of the other terms and conditions they offer. (JA 847; 1970 Tr., pp. 52-53, 136-37, 150-51, 165-67)

67. Even if the evidence established, contrary to the earlier findings, that the Credit Corporation's loans to the plaintiff were in fact 100% of the value of the land and that this particular element was unavailable from any other source, the record wholly fails to establish that the land loans available elsewhere were not equally favorable, attractive or cheap for borrowers. That finding is compelled by the absence of any showing that the other terms and conditions available at the time from other sources, when considered in their totality and in combination with whatever loan percentage to security each of those sources was offering (as to which the record is silent), made the land financing of other lenders less favorable. This conclusion is underlined by the fact that the Credit Corporation's land loans to the plaintiff were far more burdensome, and therefore less advantageous or attractive, than plaintiff characterized them in questioning its witnesses or now describes them in its proposed findings.

68. Of its witnesses upon whom plaintiff relies for the contention that defendants' financing was uniquely favorable, Messrs. Fortner, Horn, Semonin, Henney and Logan gave no testimony as to the availability or unavailability of any terms other than the alleged 100% relationship between loan and security. (JA 221, 821-35, 843-45, 847, 869, 1004; 1973 Tr., pp. 139-56) From those witnesses, plaintiff confined its proof to only that one term or element of the financing furnished by the Credit Corporation.*

*Plaintiff argues that Mr. Fortner "testified that no [100%] loans, to his knowledge, were available from any other source, *particularly when the other significant terms of the loans were considered.*" (Proposed Finding 27) No record citation is given, and Mr. Fortner's testimony, read in its entirety, fails to offer any support for the emphasized portion of the quotation.

69. The testimony of only two of the witnesses went to any term other than the element of loan ratio to security. Prof. Masten testified that it was his opinion that in the 1959-1961 period Louisville lenders would not have demanded any discount and would have generally charged a service fee of about one half of one percent (which, from his reading of the loan agreement, was what he believed the Credit Corporation had charged the plaintiff). (1973 Tr., pp. 33, 92-94) Mr. Will testified that when his savings and loan association began making land loans in the latter part of 1961 or 1962 it charged "varying service fees . . . up to five percent" but it refunded "up to eighty percent of the service fee on the basis of the number of houses we got permanent loans on. . . ." (Id., pp. 161-62) By contrast, as previously found (Findings 38, 43), the Credit Corporation placed more onerous terms upon plaintiff by effectively charging it service fees or discounts of more than 3% and 4%, respectively, on its two land financing transactions. The face amount of these land loan commitments was immediately reduced by these percentages even though the fees thus deducted drew interest until the notes would have been fully paid.*

70. Only Mr. Will testified with any specificity as to the content of land loan provisions covering the even more important elements of maturity and pay-back requirements (although Prof. Masten stated his view that these elements are generally negotiated and "tailor-made" to each loan).

*Plaintiff points out that a so-called "Sales Manual" of the Homes Division contains a statement that "most of the other major manufacturers make development loans in some form or another, but most of them charge a fee of 10% or more in addition to simple interest. We only charge a ½ point fee." (Plt.'s Proposed Finding 34, p. 22) This reference, however, does not cover all competing lenders but pertains only to "most" of the major prefab manufacturers and does not purport to indicate the interest rate, maturity, security ratio or other financing terms offered even by those manufacturers, let alone the broad variety of competing lenders of all types. (JA 1291) More importantly, plaintiff's argument ignores the fact that it was effectively charged service fees or discounts far in excess of "½ point."

Mr. Will, however, testified that the length of his association's land acquisition and development loans was "Generally about two years; just long enough for them to get the land developed and sold off in finished lots." (1973 Tr., pp. 94-95, 161) Again, the Credit Corporation's land loans to plaintiff carried more burdensome terms with respect to this element of important significance in determining the overall attractiveness or advantage of the loans.

71. Contrary to plaintiff's broad characterizations (Plt.'s Proposed Finding 32), plaintiff was not given land loans of two years' maturity. Even Mr. Fortner testified that "we had arranged to build the houses there within a year, year and a half. . . ." (JA 257) In connection with the October 28, 1960 loan agreement, Land Note 1 of that date had a maturity of only 14 months, requiring plaintiff to pay back the full proceeds "on or before December 31, 1961," with interest payable on the first of each month. Moreover, plaintiff was allowed to take down only $63,325 of its face amount of $88,000 on the inception date and thereafter only an additional $14,400 was to be disbursed in progress payments as development work was completed on 16 lots. In addition, as the shell of each house was completed, to obtain release of the Credit Corporation's lien on the lot, plaintiff was to pay back $2,200 to reduce the principal of Land Note 1, so that this land loan was to be retired by the time only 40 of the approximately 155 undeveloped lots had shells erected on them. This accelerated pay-off provision was designed to achieve for the Credit Corporation an early return of its money. (JA 45, 51, 56-57, 68, 999, 1288-89)

72. In connection with this first transaction, while Land Note 2 had a maturity of December 31, 1962 (with interest payable on the first of each month, plaintiff was allowed to take down only $107,175 of its face amount of $231,920 on the inceptions date and thereafter the balance was to be dis-

bursed in progress payments for development work in place only after plaintiff had bona fide contracts for home purchases on 23 lots (together with deposits and credit approval for the purchasers). Moreover, to obtain release of the Credit Corporation's lien on lots for transfer to the home purchasers, plaintiff was to pay back $2,200 per lot as the shell of each house was completed to reduce the principal of Land Note 2. Therefore the first advance was to be paid back as an additional 48 lots had shells erected on them and the balance when still another 56 lots reached that stage. In other words, plaintiff was obligated to have paid in regular installments the total land financing on the October 28, 1960 loan agreement by the time approximately 145 of the total 219 houses reached the shell stage. (JA 45-46, 53-54, 70, 1232)

73. In connection with the August 2, 1961 loan agreement, the land note of that date had a maturity of less than 17 months, requiring plaintiff to pay back the full proceeds "on or before December 31, 1962" with interest payable on the first of each month. As previously found, plaintiff was allowed to take down only $56,688 of the face amount of $59,000. To obtain release of the Credit Corporation's lien on lots for transfer to house purchasers, plaintiff was obligated to pay back $2,200 per lot to reduce the principal of the land note and thereafter to repay the proceeds of a Collateral Note. (JA 107, 112, 115-116, 121)

74. The Collateral Note plaintiff was obligated to execute in connection with this second financing had a maturity dates of less than 17 months (December 31, 1962) and was in the amount of $2,950, or 5% of the land note of $59,000. The principal amount was not disbursed to plaintiff but was held by the Credit Corporation to repay the Collateral Note if, by its maturity, plaintiff had erected at least 27 Homes Division houses on the 32 fully developed lots which secured this second land financing transaction.

If at least 27 houses were not completed by that date, the Credit Corporation was to take the principal amount as liquidated damages without prejudice to its rights to enforce full payment of the Collateral Note and land note, together with interest.* (JA 108, 115, 122-123) This penalty provision patently made the land loan to plaintiff more burdensome and less attractive or advantageous. There is no evidence that during the 1959-1961 period any other lender attached any such onerous term to its land financing in or out of Louisville.

75. The plaintiff has failed to prove by a preponderance of the credible evidence that the land financing it obtained from the Credit Corporation was unique because it allegedly

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*The Credit Corporation used such collatral notes for the following reasons spelled out in the so-called Sales Manual of the Homes Division: ". . . [S]ome developers have set up a program with us, borrowed the money, developed lots, then offered a complete development to another investor, paying off the Credit Corporation and never building a house. This accomplishes nothing for us. So, today, the Credit Corporation has them sign a contingent liability note for 5% per year on the principal balance [of the land financing] not to exceed 2 years . . .

"Does this approach sound a little rough on the dealer? I don't think so. Remember, [in the hypothetical case used earlier] he helped to determine a conservative one year program of development, in this [hypothetical] case 40 lots. But the [land] loan is to be paid back in only 22 lots. All you're asking him to do is produce in two years what he said could be done in less than one. Do you see the lever that this gives you? He is more likely to push hard to sell our houses when there is a penalty if he doesn't. People like to take the line of last resistance. Before this clause was put in, a program could be opened, and start slowly. It was easy to say, 'It's obviously the product, we'll go back to conventional or something else.' Now a program is opened, sales start slowly and the thinking is, 'Let's bring in a new model,' or 'Let's improve on our advertising.' I think it gives us an excellent sales tool. . . ." (JA 1291-92)

Plaintiff mistakenly cites the last quoted paragraph as showing "the leverage which the special [land] financing program conferred to the Homes Division through the Credit Corporation." (Plt.'s Proposed Finding 34, p. 23) The entire text, however, makes it clear that the "lever" language refers to the collateral or contingent liability note practice, which was not confined to special land financing but was used by the Credit Corporation on all of its land financing (the "hypothetical case" used in the quotation was one of regular land financing—JA 1288-89, 1291-92). In any event the collateral note "penalty" practice, applied to plaintiff, was clearly an additional obligation or burden upon the borrower making the Credit Corporation's land financing less advantageous or favorable and, at the same time, "additional compensation" to the Credit Corporation for the risk inherent in land development financing which the borrower could use and then reject the Homes Division's houses. (Dyas deposition, pp. 121-125) The record is devoid of any evidence that any other lending source imposed any such term upon its borrowers.

embodied terms and conditions which made it more attractive, favorable or advantageous or cheaper than available from other sources at the time. Even assuming, arguendo, that plaintiff was given 100% land loans, the record as a whole fails to show at what percentages of security land loans were available from 1959 to August 2, 1961 in Louisville (whether 50%, 70%, 90% or 99%); what rates of interest were available in relation to the loan percentage to security; what discounts or service fees were taken by lenders; the maturity and times, terms and conditions of repayment; or any of the other elements necessary to the evaluation of plaintiff's claim that the Credit Corporation's financing was uniquely attractive, favorable or cheaper and, if so, whether significantly or only insignificantly so.

4. Even If Its Land Financing Had Been Uniquely Favorable The Credit Corpoartion Had No Economic Power Or Competitive Advantage Which Precluded Other Lenders From Offering Equally Favorable Financing.

(a) Many Lenders Were Legally Free To Offer 100% Land Loans And No Lenders Were Legally Barred From Offering Equally Cheap Or Favorable Financing By Varying The Interest, Discount, Service Fee, Maturity, Pay-Back And Other Terms Of Their Loans.

76. In its proposed findings (pp. 3, 14), plaintiff urges that the Credit Corporation had "a competitive advantage in the credit market" (i.e., "sufficient economic power") to enable it to impose upon plaintiff the "tie-in agreement" by which its land financing was conditioned upon the purchase of a Homes Division house for each lot acquired and developed with that financing. The defendants answer that, even assuming that their land financing granted to the plaintiff had been shown to be uniquely favorable, attractive

or cheap, there is no evidence that the Credit Corporation had any unique competitive advantage or economic power which precluded other lenders from offering equally favorable financing.

77. The Court of Appeals, in its review of the first trial record, stated:

> "Turning to the evidence with respect to these two possible sources of economic power suggested by the Supreme Court, judical notice may be taken of the fact that national banks may make loans only on improved real estate, and that federally insured savings and loan associations are limited to loans up to 70% of the real estate as developed. Yet the record appears to be barren of any evidence that other lending institutions in the Louisville area were subject to the same prohibition, such as mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building an loan associations, and insurance companies. A jury should be permitted to evaluate the significance of the freedom of such traditional lending sources from any restriction against extending 100% financing in deciding whether competitors in the Louisville credit market were precluded from offering credit on such terms. On the same facet of the case, there was testimony at trial that soon after plaintiff negotiated its financing terms with the defendants for 100% financing, traditional lending agencies in Louisville indeed began offering loans upon the same basis. Such fact, while not conclusive of the situation as it existed at the time plaintiff's loans were consummated, could be appropriatly considered by a jury in reaching the ultimate conclusion whether the Credit Corporation had economic power in the credit market so as to some within the per se rule." (452 F. 2d 1101)

78. On this point, the record remains essentially unchanged. At most, the evidence is that only national banks and federally insured savings and loan associations—not any other lenders—are legally barred from making 100% loans, let alone lower percentage loans. Prof. Masten testified that in the 1959-1962 period the majority of commercial banks in Kentucky were not national banks and that during that period there were other than national banks in Louisville. (1973 Tr., p. 120) Thus, even apart from competing prefabricated house and conventional building material suppliers, traditional lending sources other than national banks and federally insured S&L's were legally free to extend 100% financing—for example, mutual savings banks, credit unions, pension funds, finance companies, mortgage companies, building and loan associations, insurance companies, and so on.

79. That fact is buttressed by the undisputed evidence, previously noted (Findings 63-65), that traditional lending agencies in Louisville have made 100% land loans, at the very least, since soon after plaintiff allegedly negotiated such terms with the defendants. Moreover, even as to those lenders legally prohibited from making 100% land loans, since the amount of the loan as a percentage of the value of the security is only one of the elements which must be evaluated in determining how cheap, favorable or attractive any financing is to the borrower, it does not follow that even national banks and federally insured savings and loan associations, let alone any other lenders, were unable to offer terms embodying other elements which would make their financing equally attractive, as the Court of Appeals also concluded. (452 F. 2d 1101)

(b) The Credit Corporation Lacked Any Unique Cost Advantage And Instead Was At A Cost Disadvantage In Comparison With Many Lenders.

80. The opinions of both the Supreme Court and the Court of Appeals make clear that the question of whether the Credit Corporation had any unique cost advantage which precluded other lenders from offering equally attractive financing is highly relevant to determining whether or not the Credit Corporation had economic power. The Court of Appeals, in analyzing the Supreme Court's opinion, noted that the plaintiff

> ". . . must prove that the 'unique and unusual' terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The [Supreme] Court pointed to two possible sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville." (452 F. 2d at 1101)

Notwithstanding these views of both appellate courts, plaintiff has failed to offer any evidence that the defendants were uniquely able to furnish 100% or any other allegedly cheaper or more favorable financing because of any cost savings, whether enjoyed by the Credit Corporation alone or in terms of its relationship to U. S. Steel, which would prevent other lenders from profitably extending equally cheap or favorable terms. In fact, the evidence of record is exclusively and convincingly to the contrary.

81. The Credit Corporation incurs operating costs of the same kind, character and level incurred by other lenders

including, for example, clerical and management salaries, rents, charges for office equipment, supplies and services, and taxes. (JA 964-65) At the same time, it operates at a cost disadvantage in comparison with many of the traditional lending agencies doing business in any locality on a continuing basis because those agencies serve a concentrated geographic area and have a larger, more diversified clientele of borrowers, permiting them to achieve cost savings and efficiencies not available to a lender engaged in a business like that of the Credit Corporation, as the Court of Appeals found it would be relevant for the fact-finder to take into account. (452 F. 2d at 1102)

82. To illustrate, the Credit Corporation has extended credit solely in connection with the sale of U. S. Steel homes so that the volume of its business has been small in comparison with other lending sources, offering no similar opportunity for the economies of scale they may realize. Moreover, traditional lending sources like banks generally engage in more than one type of financing and can thus hedge or spread the risks and costs not only over larger volumes of business but over different areas of the economy which may respond to different business cycles and vicissitudes. Further, because it will extend credit to builders who can not obtain from banks terms sufficiently favorable to enable them to develop subdivisions, the Credit Corporation incurs the higher costs associated with the greater risks which accompany more favorable financing terms. (JA 417-20, 956-58, 960, 962, 965, 968)

83. In view of these and other considerations, the Credit Corporation's costs will be proportionally higher and its economic performance less efficient than those of many other lenders. For example, the Credit Corporation's lending activities have regularly extended from its office in New Albany, Indiana, to several other states, although nowhere nearly nationwide. In the years when it financed

the plaintiff, the Credit Corporation entered into loan commitments with borrowers in 11 states. The total amounts it lends are smaller and more sporadic in any particular locality since its activity is confined solely to those localities where the Homes Division finds likely dealers willing to represent it.* The Credit Corporation's costs of qualifying to do business, filing reports, comply with legal and regulatory requirements, as well as its taxes and fees in each of these several states are not spread over the larger volumes of business done on a continuing basis by other lenders engaged in regular, on-going financing activities in a particular locality. Similarly, the fact that the Credit Corporation's modest volume of financing is divided among several states at a time means that its employees are less productive because tthey must spend time traveling back and forth. (JA 965)

84. Apart from the absence or any evidence as to a unique operating cost advantage, the record also fails to show in any way that the Credit Corporation had any unique cost advantage in obtaining the funds it lends. To the contrary, the evidence is that many lenders obtain their funds at lower costs and therefore enjoy a significant advantage over the Credit Corporation.

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*The sporadic character as well as small volume of its financing in particular states are indicated by the following tabular presentation of the Credit Corporation's loan commitments during the years 1960 through 1962 (JA 1291):

	1960	1961	1962
Alabama	$1,587,400	$ 8,000	$ —
Illinois	150,000	4,159,700	918,825
Indiana	1,296,275	796,900	1,871,893
Kentucky	2,706,685	1,225,190	928,165
Minnesota	—	22,000	—
Missouri	1,786,000	2,789,642	2,309,165
New York	800,000	—	—
Ohio	14,960,475	8,519,180	8,664,685
Pennsylvania	—	—	174,370
Wisconsin	160,000	—	600,000
Virginia	—	1,975,000	7,216,585

85. Again, the plaintiff introduced no proof on this point. The defendants, however, offered uncontradicted evidence as to the sources and costs of the Credit Corporation's funds for financing as compared with those of other lending agencies. Like other sales finance companies established by sellers to promote and assist in the sale of their products, which typically obtain the funds they lend by borrowing from other financial institutions (banks, insurance companies, pension funds, and so on) or on the open market, the Credit Corporation obtained its funds primarily from banks.

86. More specifically, through 1961 U. S. Steel had invested $1 million in capital stock of the Credit Corporation and it had loaned the Credit Corporation another $1 million. Against this fund, like other finance and credit companies, the Credit Corporation was able to and did borrow from banks additional amounts of approximately $10 to $14 million, so that through the end of 1961 it could have had loans outstanding to those who borrowed from it of not more than about $15 million. On the money borrowed from outside sources—the banks—the Credit Corporation paid the prime rate. On the funds borrowed from U. S. Steel the Credit Corporation paid the prime rate plus 1%, so that the cost incurred by the Credit Corporation for the funds it loaned was a blend or composite in excess of the prime rate. (JA 957, 962-66, 982, 1345-55)

87. Concededly the Credit Corporation was able to borrow at the prime rate because it was a wholly-owned subsidiary of U. S. Steel, which would stand behind the indebtedness of its subsidiary, but even Prof. Masten stated that he "would not contend that United States Steel had an advantage over . . . any large, prime corporation as a borrower of funds." (JA 963, 983; 1973 Tr., p. 47) Admittedly some smaller competitors of the Homes Division

might not have been able either to obtain the same amount of funds for loans to their customers or to obtain funds for that purpose at the prime rate*, as counsel argued before this Court in support of plaintiff's motion for a directed verdict. (JA 1028-29)

88. Such facts, however, in no way establish that the Credit Corporation had a unique cost advantage over all or even many lenders, particularly the traditional financial institutions and large corporations manufacturing prefab houses and supplying conventional building materials in competition with the defendants. As the Court of Appeals declared:

> "In this connection, it must be remembered that we are here dealing not with advantages which a finance subsidiary may give to its parent in relation to competitors in the parent's line of business, but with the *question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.*" (452 F. 2d at 1102)

Any advantages of the former type accruing to the parent (here to U. S. Steel and its Homes Division in the market for houses) are irrelevant to the test mandated by the appellate courts which have heard this case, i.e., does the Credit Corporation have competitive advantages giving it sufficient economic power in the credit market to prove a per se tying violation.

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*The record is barren of any evidence that, even if unable to obtain equivalent financing for their customers from independent lending sources, smaller competitors in the prefab or conventional house market could not match the Credit Corporation's land financing terms on any particular transaction, even though compelled to borrow at higher than the prime rate, particularly if they were willing to forego some or all of the profit on their extension of credit, limiting themselves instead to the profits derived from their house business.

89. In fact, the evidence demonstrates that the Credit Corporation's costs of acquiring money to lend were unquestionably higher than those incurred by commercial banks, savings banks, saving and loan associations, insurance companies, pension funds and others (as the Court of Appeals found the finder of fact could infer from the first trial record*, which remains unchanged on this issue). For example, commercial banks have available the funds which their depositors place with them, all of which cost the banks less than the prime rate, the lowest rate at which they in turn lend those funds.** Banks also have a competitive advantage in terms of lower costs for the money they lend arising out of the rediscount mechanism administered by the Federal Reserve System. Similarly, savings banks and savings and loan associations have large savings account deposits upon which they pay interest at less than the prime rate. Insurance companies, too, have large funds available to lend from the premiums paid to them and from the large reserves they have accumulated. Mortgage companies and other local lenders engaged in the financing business typically lend either from their own reserve funds or borrow from outside financial institutions at the prime rate (indeed, plaintiff's witness, Mr. Horn, testified that when his mortgage company began offering 100% land financing to meet competition of other house suppliers

*452 F. 2d at 1102.

**Indeed, the Supreme Court and other courts in dealing with cases involving commercial banks have noted the competitive advantage they have over other lenders because they obtain the bulk of their funds interest-free in consequence of their unique power to accept demand deposits. Although Prof. Masten disagreed with the following statement (1973 Tr., pp. 125-26), the Supreme Court has set forth this financing fact of life as follows: Commercial banks, in competing with other credit or financing sources, enjoy "such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. . . . The reason for the competitive disadvantage of most lending institutions *vis-a-vis* banks is that only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, by virtue of their unique power to accept demand deposits." United States v. Philadelphia National Bank, 374 U. S. 321, 356 (1963).

(and of the Credit Corporation, he believed) it did so with its own capital and without the need to resort to any outside borrowing from insurance companies or other sources). Similarly, at least established, reasonably large manufacturers of prefab houses and other suppliers of housing materials would borrow at the prime rate. (JA 819-22, 839-44, 956, 962-66)

90. The Credit Corporation's profit record confirms the fact that it not only lacked any cost advantage but rather operated at a cost disadvantage in comparison with many other lenders. While it was organized to earn a profit as well as serve the Homes Division's dealer-builders, as both the Court of Appeals and Justices of the Supreme Court* stated, "the record justified the conclusion that the Credit Corporation, while not operating at a loss, had comparatively low profits." (452 F. 2d at 1102) In 1960 and 1961, the years in which the challenged land financing commitments were executed with the plaintiff, the Credit Corporation's total net profits from all sources (not just from land financing) were $52,197 and $59,053, respectively. In those same years, its earnings in relation to net worth were 4.5% and 4.8%. (JA 1355)

91. The record at the first trial showed that at least two local mortgage companies in Louisville had higher earnings in relation to net worth in both those years. (JA 423-24) At the second trial, Prof. Masten testified (citing comparative figures) that in those years, 1960 and 1961, the Credit Corporation "was only about half as profitable as the average commercial bank" and that it was "not a particularly profitable operation"—it was "relatively unprofitable." (1973 Tr., pp. 40-41, 45, 115) More importantly, the record contains no evidence that any lenders, in

*Dissenting opinion of Justice Fortas, 394 U. S. at 325.

or out of Louisville, had lower profitability or rates of profit than the Credit Corporation.

92. That the Credit Corporation's low rate of profit confirms its cost disadvantages in comparison with other lenders is emphasized when the fact that its special land financing was guaranteed or underwritten by the Homes Division is considered. As logic dictates and, indeed, as plaintiff recognizes, "since the special financing . . . loans . . . were guaranteed by United States Steel Corporation, the Credit Corporation . . . [could not] show a loss at least as a result of those loans since any such loss would have been covered by" the guaranty. (Plt's Proposed Findi 33, p. 20) It is manifest, therefore, that any risk incident to land loans such as those negotiated by plaintiff did not reduce either the Credit Corporation's profits or rate of profit, ad yet the evidence, supplemented by plaintiff's own expert witness, is that the Credit Corporation's rate of profit was substantially lower than that of many other lenders. Obviously, in the face of such evidence, the Credit Corporation could have had no cost advantage, unique or otherwise, even assuming any possible adverse loss experience incident to special land financing.*

93. Based upon further testimony by Prof. Masten, plaintiff makes several erroneous and mutually inconsistent contentions in an effort to rebut the salient fact that the Credit Corporation not only had no cost advantage but rather operated at a cost disadvantage by comparison with other lenders. Prof. Masten testified that "theoretically" the Credit Corporation "had an opportunity to earn more

*Anomalously, at the same time that it recognizes that the Credit Corporation was insulated against loss on the guaranteed special land loans, plaintiff goes on to argue the non sequitur that "the Credit Corporation was able to make a profit comparable to that of the two savings and loan associations with which its profits were compared in spite of the high risk type loans made under the special financing program" (plaintiff also chooses to ignore Prof. Masten's testimony as to how poor the Credit Corporation's profit showing was measured against even the average commercial bank). (Plt.'s Proposed Finding 33, p. 20)

than the average commercial bank. . . ." He noted that in 1960 and 1961, the Credit Corporation paid no dividends on its stock to U. S. Steel. Referring to an exhibit which showed that as of December 31, 1962 (more than a year after the Credit Corporation's last loan agreement with plaintiff) U. S. Steel had agreed, if requested, to purchase additional stock of the Credit Corporation up to a limit of $9 million, Prof. Masten stated that, instead of borrowing from banks at the prime rate, the Credit Corporation could have obtained this $9 million to satisfy its lending requirements and that he did "not see any way in which it would have been encumbered." (1973 Tr., pp. 40-44)

94. Based upon this testimony, plaintiff now argues in its proposed findings (pp. 36-37) that U. S. Steel

> "could have used some of its available cash to completely capitalize the Credit Corporation, which would have placed the Credit Corporation's cost of money at a non-existent or every low level. Instead of electing this course of action, the United States Steel Corporation purchased a certain amount of stock in the Credit Corporation and allowed the Credit Corporation to use United States Steel's credit standing to borrow money from banks at the prime rate."

95. First, as plaintiff's own argument makes clear and as defendants have always stated, in fact, U. S. Steel's credit standing was used to obtain for the Credit Corporation the best possible loan rate—the prime rate. Yet even with this advantage flowing from its subsidiary relationship to U. S. Steel, the Credit Corporation, as shown by the uncontradicted evidence treated in the preceding findings, operated at a cost disadvantage to many other lenders and is not shown to have had a cost advantage over any lender. Sec-

ond, U. S. Steel would not place any more of its capital than necessary into the stock of its subsidiary because, as Prof. Masten himself stated elsewhere in his testimony, the Credit Corporation was "relatively unprofitable" and "certainly a corporation like U. S. Steel could have used the funds in some other area more profitably." (1970 Tr., p. 116)

96. Finally, the contention that the Credit Corporation could have been given a cost advantage by substituting U. S. Steel's equity capital for the funds it borrowed to lend to builder-dealers betrays a basic misconception of why the Credit Corporation was created and why at all times its parent (or any other in similar circumstances) would contribute only a small equity in relation to the total funds needed to fullfill loan requirements. Prof. Masten stated that he

> "frankly would not know why [U. S. Steel] decided to set up a separate subsidiary, as opposed to doing it directly as a part of the [parent corporation]. . . ." (1973 Tr., p. 43)

The record makes clear, however, that U. S. Steel's purpose in organizing the Credit Corporation was the same purpose which has universally prompted the creation of separate financing subsidiaries where large, successful manufacturing companies undertake a credit or financing operation. (JA 957, 962, 982) By establishing a credit subsidiary and borrowing through it, a manufacturing parent can obtain from commercial banks and other principal funding sources a larger sum in relation to committed equity than it could by itself, because these primary financing sources accept a higher debt-to-equity ratio for finance companies than for manufacturing companies.

This allows more loans at lower net cost to the overall enterprise (parent and credit subsidiary) since the parent need not divert capital it can devote to more profitable uses.*

However much money the Credit Corporation might have obtained from U. S. Steel or borrowed from others at the prime rate is not determinative of the crucial issue whether its costs were uniquely lower and its rate of profit higher than those of other lenders. Its costs of obtaining funds to lend as well as its operating costs, as demonstrated by the record, were unquestionably higher than those of the many specialized lending agencies committed almost exclusively to the financing business, including commercial banks, savings banks, savings and loan associations, insurance companies, pension funds and others which acquire their funds at less than the prime rate, as they must in order to profit by the loans they make at the prime rate.

97. Similarly, the implications in Prof. Masten's testimony that the Credit Corporation paid no dividends in the relevant period and was not required to maximize its profits by comparison to those a lender operating on conservative, purely financial standards might achieve in no way prove that the Credit Corporation had any cost advantage. As earlier noted, even insulated against loss incident to any special land financing, the Credit Corporation still showed a lower rate of profit and, therefore, higher comparative costs than many other lenders.

98. On the other hand, Prof. Masten's conclusion (1973 Tr., pp. 111-112) that "a lender who is in the business of lending for the purpose of making a reasonable profit without undue risk exposure would have been unlikely to make" 100% land loans like those he believed the plaintiff negotiated with the Credit Corporation is also

*Cf., General Motors Acceptance Corp., Quarterly Report (June 30, 1969).

belied by the record. Thus there is absolutely no evidence even suggesting that the Credit Corporation would have operated at a loss without the Homes Division guaranty. To the contrary, as already noted, shortly after the Credit Corporation's loans to plaintiff and continuing thereafter, traditional lending sources in Louisville have made 100% loans. There is no evidence that any lenders failed to realize a profit when they became willing to make such loans or that in 1959, 1960 and 1961 they could not profitably have extended such financing, and it is inconceivable that such traditional lenders would make such loans without making a reasonable profit.

99. What the record shows, then, as established by plaintiff's own witnesses, is that other lenders have been able to and have in fact granted 100% land financing contrary to any contention that the Credit Corporation had a unique ability to make such loans. Similarly, the record undercuts Prof. Masten's opinion that "prudent" lenders, the "normal or conventional" channels of credit seeking a "reasonable profit without undue risk," would not have made loans like those plaintiff negotiated (which he assumed were 100% loans) until after 1965. Even if that opinion were otherwise sound, the evidence establishes that such lenders were not precluded from doing so by any cost or other competitive advantage enjoyed by the Credit Corporation.

100. In summary, the record fails to show that the Credit Corporation had any economies of scale or cost advantage which precluded others from profitably offering land financing as favorable as any granted by the Credit Corporation, even if it had been 100% financing. Instead, as the Court of Appeals noted in reviewing the evidence, "There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation." (452 F. 2d at 1102)

(c) The Homes Division Guaranty

101. At the first trial, plaintiff urged in support of its motion for a directed verdict that the Homes Division's guaranty or underwriting of the land financing extended to the plaintiff and certain others showed that the Credit Corporation had economic power over credit. (JA 1031) At the second trial, Prof. Masten testified that ". . . another characteristic of this loan which makes it exceedingly unique is that the loan was guaranteed not by an affiliate of the borrower, but by an affiliate of the lender." (1973 Tr., p. 33) He stated, "So the two things that I would emphasize is the hundred percent loan, with a guarantee by the parent of the lender. This is the reason I am characterizing the loan as being unique." (Id., pp. 112-113)

102. As the Court of Appeals stated, however, the Homes Division guaranty does not demonstrate that the Credit Corporation had economic power over credit: "On the contrary, it may simply be a factor which demonstrates that it was necessary for the Credit Corporation to be subsidized against any loss incident to the greater cost and risk involved." (452 F. 2d 1102) As shown by the prior findings, even as so insulated against loss from any special land financing, the Credit Corporation had higher costs and a lower rate of profit than many other lenders.

103. Moreover, as Prof. Masten recognized, the guaranty meant that the Homes Division would bear any loss experienced in connection with special land financing. As he stated, under the "profit center" concept of independent responsibility for the profitability of each business unit within a diversified or conglomerate enterprise, the Homes Division was one profit center and the Credit Corporation another. (1973 Tr., pp. 115, 118-119) In keeping with

the profit center concept,* if losses were incurred on any financing underwritten by the Homes Division, then those losses would be borne by the Homes Division and charged against its operations in the housing market, the tied product market. Wholly consonant with the profit center concept, therefore, house sales by the Homes Division would bear the cost or risk of any cheaper or more favorable land financing granted by the Credit Corporation. Even if the Homes Division had earned higher than normal profits on the sale of its houses, its subsidization of cheaper prices for the financing granted by the Credit Corporation would have been the result not of any power in the credit market but rather because the Homes Division had either (1) the cost advantage of greater efficiency in the market for houses or (2) some economic power enabling it to charge higher than normal prices in that market. Power generated in the market for houses—here the tied product market—is inconsistent with the per se doctrine, which comes into play only when power exists in the tying market.** The Homes Division's willingness to bear any losses on special land financing, therefore, in no way represented any economies of scale, lower costs or higher rate of profit enjoyed by the Credit Corporation in comparison with competing lenders in the credit market, the market for the tying element.

*The "profit center" concept has been discussed in various court decisions. For example, in United States v. International Telephone & Telegraph Corp., 324 F. Supp. 19, 45 (D. Conn. 1970), the court noted that ". . . ITT is organized into a series of 'profit centers,' each managed and staffed by personnel whose business careers, advancement, financial rewards and reputations depend upon the success of the specific profit center with which the men are identified, rather than upon the performance of ITT as a whole."

**Patently a seller with power in product A does not need to condition his sale of product B by tying to it the purchase of product A, in which he already enjoys power. See the discussion of the "cheaper by transfer" economic analysis of this case contained in The Supreme Court, 1968 Term, 83 Harvard L. Rev. 1, 241-244 (1969).

104. In fact, not only did the Homes Division fail to earn higher than normal profits but instead it incurred anannually, without exception, losses, and those losses very substantially exceeded the total profits earned by the Credit Corporation.** With such losses, the Homes Division could not possibly have had either a cost advantage or any kind of economic power in the housing market, even if power in that market had any relevance to the per se tying rule where the tying element is credit and therefore power or competitive advantage in the credit market must be established. The Homes Division's dismal loss record is consistent only with what defendants have urged from the inception of this case, i.e., that in order to promote the sale of its houses the Homes Division was willing to bear the risk of granting special land financing to the plaintiff and certain others, in effect reducing the price of its houses to the extent of any additional risk incurred or saving allegedly realized by dealer-builders like the plaintiff in connection with the loans.

105. Finally, the testimony of plaintiff's own witnesses that even traditional credit sources, Louisville lenders in "normal or conventional" financing channels, were stimulated by the competition of others to grant 100% land financing demonstrates again that other lenders were willing and able to grant equally or more favorable terms than the Credit Corporation without any guaranty from the borrower or any other source. That evidence, showing that the defendants had no unique ability to grant 100% or special land financing, also demonstrates that such financing is not profligate, rapacious or, in totality, a losing business.

**The Homes Division in 1960 and 1961 incurred total losses of $627,727 as compared with Credit Corporation's total profit in those years of $111,250. (JA 1355; 1973 Tr., pp. 172-74, 188-89)

(d) The Allegedly Higher Price and Poorer Quality of the Homes Division's Houses

106. Mr. Fortner testified that the plaintiff would not have purchased the Homes Division's houses without the financing made available by the Credit Corporation, and that instead he would have gone on selling lots to other builders as his Iroquois company had in the past. (JA 227) Plaintiff's proposed findings, however, characterize his testimony more broadly:

> "The type of loan offered Mr. Fortner by the Credit Corporation was highly attractive and unique to Mr. Fortner since to his knowledge no such loans were available from other sources and for that reason he was willing to accept at that time the requirement that he erect upon each lot in the subdivision a prefabricated house package manufactured by the Homes Division. . . ." (Plt.'s Proposed Finding 13)

As indicated in earlier findings (e.g., 16, 17), however, there is substantial evidence in plaintiff's own exhibits that, prior to and for some time after at least the first loan agreement, Mr. Fortner was attracted to, if not affirmatively enthusiastic about, the houses themselves.

107. On September 16, 1960, he wrote to the Home Division stating that

> "After visiting your plant and viewing your 1961 models, I am more convinced than ever that we can develop a very successful and mutually profitable program. . . ." (JA 1229)

He testified in a pretrial deposition introduce into evidence:

> "There was one meeting that came to mind and that's the meeting where the . . . sales force was

> invited over to their plant and I believe this was the spring of '60, possibly. We were invited over there and at that time we were shown pictures and movies and folders and models, existing models that was up and generally told how quick and how easily the houses went together and their models spoke for theirselves, which was real attractive. . . ." (A. B. Fortner Dep., pp. 59-60)

108. At the first trial, after plaintiff's counsel told the jury that "Mr. Fortner will tell you that . . . he, at the time this transaction was initiated, had no reason to believed that they did not have a quality product . . . [and] that he had no reason to believe that . . . the prefabricated houses wouldn't be adequate" (1970 Tr., Vol. II, pp. 52-53), Mr. Fortner again testified that

> ". . . we were taken over to their plant where . . . we had a meeting over there and they showed us slides and different things about the houses and we were just generally sold, without checking around any, to any of the places where they were building 'em, that they were good houses. . . ." (JA 217)

109. Plaintiff's exhibits also show that from the first discussions between the parties, the proposed project was to be "contingent upon a prior determination by [Mr. Fortner] that [the Homes Division] houses can be profitably built. . . ." (JA 1231) Mr. Fortner confirmed that he had done so, testifying, for example, that ". . . in fact, I got with Mr. Miles [plaintiff's building superintendent] and he went over all of the figures and everything before we started these houses." (JA 235, 603)

110. In addition, Mr. Fortner, based upon his more than 30 years in the real estate business, testified that he was able to and did underprice the Homes Division houses, in-

suring that they would sell quickly when introduced on the market even though he could have charged higher prices. (A. B. Fortner Dep., pp. 43-44) Thereafter, plaintiff in fact raised its prices for the Homes Division houses it was selling. (JA 267-268, 412, 603) Notwithstanding that price increase, exhibits introduced by plaintiff indicate that the houses remained very competitively priced in relation to those of competing sellers ("he felt that he had priced his product extremely competitively"; "sales pricing seems to be below that offered by competitors"). (JA 1107, 1116)

111. As previously found, even well into his building program with the Homes Division houses, and notwithstanding his testimony as to defects and delays, Mr. Fortner asked for further financing to acquire an additional 32 lots on which to erect Homes Division houses, and that request was granted with the execution of the loan agreement of August 2, 1961. Significantly, as shown by another of plaintiff's exhibits, at that time Mr. Fortner was in the process of erecting four Homes Division Houses financed not by the defendants but with financing obtained locally in Louisville. (JA 1116)

112. Moreover, at late as January, 1962 (when plaintiff had completed 43 Homes Division houses), although Mr. Fortner testified that by then he had become dissatisfied with their quality he nonetheless stated in writing:

> "Our biggest and nearest competitor, Ben Swindler, has sold well over a hundred homes this past year, and I think everyone that will compare his home at $11,875 with our [Homes Division] B-1 at $11,400 will agree that we have the superior house for less money." (JA 1318)

At the trial, Mr. Fortner admitted on cross-examination that he had shopped the Swindler subdivision and that

plaintiff was offering a better house for $475 less. (JA 547, 549)

113. As previously found, even asof April 26, 1962, the plaintiff was not too displeased with the quality of Homes Division houses to urge that a new model be made available to permit selling it at a price of $10,000 to homeowners because Mr. Fortner had "become convinced that his salvation lies in a $10,000 house" which would permit qualification for special FHA homeowner financing. (JA 1110-1111) In fact, any sales difficulties plaintiff was encountering during the period of its project with the defendants were shared by other single-family home builders in Louisville at the time. Experienced real estate witnesses testified without contradiction that, while financing was easy, the years 1960-1961 showed a letdown in home construction from prior years, confirming their testimony with figures from the Real Estate Board showing the following decline in new, single-family construction permits in Louisville (JA 1000; 1970 Tr., Vol. XIV, pp. 94-98, 101-104):

1958.....	2,976	1960.....	1,902
1959.....	2,748	1961.....	1,813

114. It was not until long after the transactions between the parties that the plaintiff first concluded that the Homes Division's houses were allegedly overprices. Plaintiff's counsel told the jury at the first trial that it was not until 1962 that plaintiff considered allegedly comparable prefab and conventional houses and found that it could build them "for $400 to $450 approximately less than it was costing them to build the comparable United States Steel package home." (1970 Tr., Vol. III, pp. 77-78) In fact, it was Mr. Miles who undertook such a comparative cost estimate, and he testified that he prepared his cost estimate on July 23, 1962. (JA 630) That was shortly after plaintiff had started this lawsuit, and Mr. Miles' estimate became

the basis of plaintiff's claim that the Homes Division's houses were overpriced.

115. In fact, the sole evidence that the houses were allegedly overpriced was the opinion testimony of Mr. Miles, plaintiff's employee on the project, based upon his ex post facto calculations after commencement of the action. Mr. Miles compared a Homes Division house price with only one other prefab manufacturer's house. He made no price comparison with the houses of any of the approximately 10 to 25 other prefab sellers supplying the Louisville and Kentucky areasin the 1960-1962 period (JA 883, 1278), so that there is an unanswerable question as to whether his calculations reflected the actual "going market price." That is particularly true because Empire Homes, theone prefab manufacturer whose product he purported to compare, went bankrupt. (JA 666)

116. In comparing a Homes Division house both with the Empire Homes package and with a hypothetical house constructed of conventional building materials, Mr. Miles testified that additional labor and materials would be necessary to make them comparable to the finished components delivered in the Homes Division package. (JA 636-37, 640, 654-55). Apart from the necessarily subjective nature of any evaluation of what such additional labor and material elements would in fact cost, Mr. Miles had used in his comparison an invoice price from only one Homes Division package delivered to plaintiff. That particular invoice bore the highest price for the particular model supplied, the prices varying with a variety of different options and extras available to the purchasing homeowner. (JA 673-75, 686-87)

117. Other subjective aspects of Mr. Miles' testimony turned upon differences in the quality and cost of a variety of materials which differed as between the "typical" Homes Division house and Mr. Miles' "comparable" houses (JA 655, 661-668, 933-34), none of which he actually constructed

and the quality specifications of which he could not identify. He conceded that his "comparable" house price calculations did not cover various materials or services furnished by the Homes Division, the latter including, for example, filed engineering service and advertising money. (JA 460-61, 667, 696-97) The testimony of Mr. Miles also raised issues as to whether he had selected the proper Homes Division house for comparison with his hypothetical "conventional" house, as well as the fundamental question whether that comparison had any validity since Mr. Miles, in defending its comparability, was reduced to the assertion, "It's different, but it's still a house." (JA 630, 657, 666, 67-75, 678-93)

118. The estimates made by Mr. Miles, their overly narrow focus and their necessarily subjective foundation must be weighed against the other objective evidence. Mr. Fortner's own statements were that he was able to and did underprice the Homes Division houses so that they were exceedingly competitive and yet of better qualify than those of his leading competitor in Louisville. This evidence, taken together with other proof, including the fact that plaintiff made profits on the houses it sold (its financial difficulties arose from its inability to sell houses on the time and volume basis essential to cover its overhead costs) and the fact that the Homes Division—rather than earning the profit (or even abnormally high profit) that would be likely if it were successfully exacting higher than competitive prices—incurred staggering losses, dictates the conclusion that the preponderance of the credible evidence fails to establish that the Homes Division's houses were overpriced or bore artificially high prices in relation to the going market price for prefab or conventionl houses.

119. Even if the record established that there had been a significant price differential between the Homes Division's houses and the competitive market level for comparable

houses, however, it does not follow that any such supposed fact would prove that the defendants had economic power or any competitive advantage in the market for the tying element, credit or financing. As the Court of Appeals stated:

> "Plaintiff's reference to the Supreme Court majority's statement in regard to the Homes Division houses being priced some $400 higher than comparable houses would not appear to have any conclusive effect on the question which we are not considering. It is clear from the opinion that Mr. Justice Black and those justices who joined him in the majority opinion did not reach any definitive conclusion as to the effect of this factor. On the contrary, as pointed out, they merely said that a substantial price differential 'may suggest' or is not inconsistent with the 'possibility of market power.' The evidence on this question should be weighed by the jury and its proper probative value determined." (452 F. 2d at 1102-1103)

120. Where the tying product itself is not fungible but rather is unique or distinctive, it may be permissible to infer economic power over that distinctive tying product from proof that the buyer, at the time he accepts the tying condition, would have preferred a competing brand because he deemed the tied brand noncompetitively priced or of inferior quality.* Clearly, however, that is not so where the tying element, like the money, credit or financing in this case, is wholly fungible and theonly thing unique and desirable about it is the seller's willingness to offer it at an allegedly lower price (i.e., more favorable or attractive terms) conditions upon the tie-in requirement.

*Cf., Northern Pacific Railway Co. v. United States, 356 U. S. 1, 16-17 (1958) (Dissenting opinion, Harlan, J.).

121. In those circumstances, the buyer will balance the burden of the undesired tied product against the saving he can realize on the fungible tying product, and he will accept the tying condition only because he concludes that the saving compensates him for the burden of accepting the tied product (i.e., because he considers the total price of the combined elements of the package, tying and tied products, to be attractive). Thus, even where a buyer, solely because the fungible tying product is offered at a lower price, knowingly takes a tied product he deems undesirable or burdensome in lieu of a competing brand he would otherwise prefer, that fact neither proves nor disproves that the seller is able to offer the lower price because of economic power—power which in those circumstances can arise only because the seller has a unique cost advantage or other competitive advantage which precludes his competitors in the market for the fungible tying product from offering equally cheap or favorable terms.*

122. Particularly is this true in the factual context of this case where it cannot be reasonaly inferred that all the plaintiff was seeking was the cheapest or most favorable

*As Justice White stated in analyzing plaintiff's claims in this case: "There was nothing unique about U. S. Steel's money except its low cost to petitioner. A low price on a product is ordinarily no reflection of market power. It proves neither the existence of such power nor its absence, although absence of power may be the most reasonable inference. One who has such power benefits from it precisely because it allows him to raise prices, not lower them, and ordinarily he does so.

"A low price is the tying product—money, the most fungible item of trade since it is by definition an economic counter—is especially poor proof of market power when untied credit is available elsewhere. In that case, the low price of credit is functionally equivalent to a reduction in the price of the houses sold. Since *the buyer* has untied credit available elsewhere, he *can compare the house-credit package of U. S. Steel as competitive with the price of the untied credit plus the cost of houses from another source.* By cutting the price of his houses, a competitior of U. S. Steel can compete with U. S. Steel houses on equal terms since U. S. Steel's money is no more desirable to the purchaser than money from another source except in point of price. The same money which U. S. Steel is willing to risk or forego by providing better credit terms it could sacrifice by cutting the price of houses. There is no good reason why U. S. Steel should always be required to make the price cut in one form rather than another, which its purchaser prefers," (394 U. S. at 515)

credit terms it could obtain. Contrary to Prof, Mastern's testimony that because the Credit Corporation allegedly "made credit available on a very favorable basis . . . it was in a sense like giving candy to a baby"** (1973 Tr., p. 48), in fact a houing developer—even one without the expertise of Mr. Fortner and his personnel—would be more concerned with the quality of the houses, the tied product. Even 100% land financing on inferior, overpriced houses would be less attractive than 60% financing on good quality, competitively priced houses since the developer must be able to sell them.

123. Moreover, the plaintiff here did not even consider the tied product, the Homes Division's houses, to be a burden (either in terms of allegedly poor quality or high price) until after it had negotiated and accepted the tying arrangement as a condition to the allegedly more favorable financing granted on October 28, 1960 and again on August 2, 1961. Even if plaintiff's evidence and contentions could be accepted at full value, they would show at most only that plaintiff would not have bought the Homes Division's houses but for the more favorable terms or lower price of the land financing finally extended by the Credit Corporation. Such evidence fails completely to show economic power over credit; it merely shows defendants' willingness, in an attempt to promote house sales, to offer credit at a lower price than the plaintiff allegedly could have obtained it from other lenders.

**Significantly, Prof. Masten did not include any alleged poor quality or higher pricing of the Homes Division's houses among the reasons supporting his opinion that the Credit Corporation had economic power over land financings, perhaps because he recognized that any such claim would dilute the argued attractiveness of the purportedly uniquely favorable or cheaper financing.

(e) Even if Its Loan Terms Had Been Uniquely Favorable, That Fact Would Fail to Show That the Credit Corporation Had Any Unique Competitive Advantage or Economic Power Making Other Lenders Unable to Offer Equally Favorable Financing.

124. As noted earlier (Finding 101), Prof. Masten testified:

> "So the two things that I would emphasize is the hundred percent loan, with a guarantee by the parent of the lender. This is the reason I am characterizing the loan as being unique." (1973 Tr., pp. 112-113)

Another apparently secondary basis for his opinion that the loan commitment to plaintiff was unique and "would not have been available from . . . the normal channels of credit for development and construction lending" was the fact that "the loan was tied to the condition that the borrower purchase homes from the [Homes Division]." (Id., pp. 32-33) Plaintiff's proposed findings (p. 32) advert to this testimony, stating that "Dr. Masten also pointed out that the tie-in provisions of the loan themselves made the loan unique. . . ."

125. At the same time, however, even if such a condition were "unique," it would presumably be a negative factor which would make the loan less attractive or favorable from the standpoint of the borrower. As discussed earlier in connection with the case where a borrower knowingly accepts lower quality or higher priced houses, the tying condition would be one of the many factors the borrower would evaluate in determining whether the combined package, houses and financing, was cheaper or more attractive than available elsewhere. Thus, as Prof. Masten testified:

> "I would say that because a seventy percent borrower has thirty percent of his own equity, he has much more freedom in choice of lender. He does not have to enter into any kind of an agreement which ties him to a certain product." (1973 Tr., p. 130)

Patently the tying requirement did not make the loans to plaintiff "unique" in the sense that other lenders could not impose tying conditions of their own. In fact, plaintiff's own witnesses, Messrs. Horn and Will, testified to tying arrangements which were part of their financing of land acquisition and development, and even Prof. Masten testified that banks impose a tie-in upon borrowers at the prime rate by requiring them "to maintain a compensating balance with the bank. . . ." (JA 844-48; 1973 Tr., pp. 34, 161-62)

126. Moreover, Prof. Masten conceded that he was not in a position to claim that suppliers generally, as well as those who manufacture prefabricated houses, do not condition their financing upon the borrower's buying their products. (1973 Tr., pp. 108-109) As indicated in earlier findings, not only is that the fact but small businesses and dealers throughout the economy have increasingly been obtaining their credit or financing from their suppliers rather than from banks or other traditional lending sources.* Indeed, as Justice Fortas noted in this case:

> "It is common in our economy for a seller to extend financing to a distributor or franchisee to enable him to purchase and handle the seller's goods at retail, to rent retail facilities, to acquire fixtures or machinery for service to customers in connection with distribution of the seller's goods, or, as here, to prepare the land for and to acquire and erect the seller's houses for sale to the public . . . Almost all modern selling involves providing some ancillary services in connection with making the sale—delivery, installation, supplying fixtures, servicing, training of the customer's personnel in use of the material sold, furnishing display material and sales aids, extension of credit. Customarily—indeed almost invariably—the seller offers these ancillary services only in connection with the sale of his own products, and they are often offered without cost or at bargain rates." (394 U. S. at 524-525)

*See, for example, Financing Small Business, Report to the Commission on Banking Currency and the Select Committee on Small Business by the Board of Governors of the Federal Reserve System, April 11, 1958 (U. S. Printing Office), p. 498.

127. Although he stated that in his opinion the loan to plaintiff was "unique" in the sense "that it would not possess the characteristics of an *average type loan*" (1973 Tr., p. 52), Prof. Masten concluded that because of the "unique" terms of that loan the Credit Corporation had economic power or leverage in the land acquisition and development "segment" of the credit market. He testified that the Credit Corporation

> ". . . had definite leverage in a segment of the credit market; the segment related to land acquisition and development. . . . I believe that it did have leverage in this particular area because of the uniqueness of the terms of the loan." (Id., pp. 47-48)

Plaintiff's proposed findings (pp. 31-33) urge this same conclusion from Prof. Masten's testimony. At no point in his testimony, however, did Prof. Masten testify that the Credit Corporation's land loans to the plaintiff were unique in the sense that no other lender was able to offer equally favorable, attractive or cheap loans.

128. Both the Supreme Court and the Court of Appeals held that economic power or competitive advantage or leverage in the credit market can not be established by showing that loan terms are uniquely favorable. Even if its terms make a loan more favorable or cheaper than available elsewhere, it must be shown that the lender was uniquely able to offer such terms because all other lenders were precluded from making equally attractive loans. The Supreme Court majority declared:

> "We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.'" (394 U. S. at 505)

In stating what must be proved to establish that the Credit Corporation had the economic power or competitive advantage essential to the per se rule, the Court of Appeals said:

> "As we have pointed out, the [Supreme] Court expressly rejected Fortner's 'apparent' argument that the uniqueness of the loan, namely the fact that one hundred percent land financing may have been unavailable elsewhere in Louisville at the time the loan commitment was made, alone constitutes proof of 'sufficient economic power.' It was apparently the view of the Court that, while plaintiff need not prove dominance in the credit market on the part of the Credit Corporation, *it must prove that the 'unique and unusual' terms offered by the Credit Corporation reflected some unique economic advantage over its competitors.* The Court pointed to two possible sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the

> relevant credit market in Louisville. . . . [The fact-finder should decide] whether competitors in the Louisville credit market were *precluded* from offering credit on such terms. . . . Proof alone that an institution is prohibited from granting 100% land financing would therefore seem to be insufficient to establish the fact that it is *unable* to offer terms embodying other elements which would make its financing equally favorable or advantageous to the borrower. . . . [W]e are here dealing . . . with *the question whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market.*" (452 F. 2d at 1101, 1102)

129. This mandate of the appellate courts which have reviewed this case also disposes of the plaintiff's arguments based upon the Credit Corporation's allegedly being the sole lender in a "segment" of the credit market limited to its loans to the plaintiff. Thus, in its propsed findings (p. 33), plaintiff urges:

> "Dr. Masten pointed out that there are really segments of the credit market and it is not one over-all market. He pointed out that in his opinion 100% land acquisition and development loans of the nature and terms granted to the plaintiff were a segment of the credit market, and that if you only have one lender making such loans within that segment of the market, then that lender has economic power within that segment. . . ."

130. Even a single seller in a properly defined market,* however, does not have economic power unless he has some

*Prof. Masten testified that his "segment" of the market concept was one of "two principal theories of interest rates" and that there was "a whole body of economic literature . . . revolving around the con-

(Footnote continued on following page)

unique cost or other competitive advantage which precludes other sellers from profitably entering that market and competing with him, as the record here shows other lenders did in the market as defined by Prof. Masten. That fundamental economic principle is implicit in the rejection by both the Supreme Court and the Court of Appeals of the contention that the requisite economic power could be inferred simply by proof that the Credit Corporation's loan terms were, allegedly, uniquely favorable at the time.

131. Rather those courts made it clear that the evidence must show that other lenders were unable to compete by offering comparable financing because barred by some competitive advantage enjoyed only by the Credit Corporation. Acceptance of plaintiff's contention would mean that no supplier, even a new entrant to his product market with only modest resources, could ever offer more favorable financing terms than other lenders (including competing suppliers) chose to offer without being guilty of a per se tying violation of the antitrust laws. In summary, Prof. Masten's testimony fails to establish that the Credit Corporation, alone or because of its relationship with its parent, had any unique cost or other competitive advantage precluding other lenders from offering equally favorable financing terms.

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flict between those theories," although he had never seen anybody who had written about the "segment" theory apply it as he did (1973 Tr., pp. 133-134) He reiterated throughout his testimony that no two loans are the same ("each loan [is] almost separate in its own characteristics"; "there is an element of differentiation from one loan to another"; "each loan has characteristics that differentiate it from other loans"). (E.g., id., pp. 27, 52-53) Prof. Masten conceded that while it was his opinion two different loans would fall in "two different markets," nonetheless "They may not be totally unrelated." (Id., pp. 130-131) He also agreed that, because a lender has many options as to the terms or quality of the loan he chooses to offer each borrower, "Credit sellers, unlike other sellers, can vary the product they offer as to each buyer as both the credit needs and the risk factor of each buyer change." (Id., pp. 136-137) Contrary to the import that must follow from Prof. Masten's testimony, it can not be reasonably urged that a single lender and a single borrower simultaneously and exclusively occupy a number of markets as their negotiations span a variety of different terms and conditions.

(f) The Homes Division's Sales and Market Position and and the Volume of Business Tied by the Allegedly Unique Land Financing Challenged by the Plaintiff.

132. Plaintiff claims that

> "with insignificant exceptions, all loans made by the Credit Corporation contained *the tie-in agreement. . . ., resulting in millions of dollars of sales* of house packages by the Homes Division in 1960, 1961 and 1962. . . . Thus, the undisputed evidence establishes that substantial amounts of interstate commerce in the tied product . . . were *restrained by the tie-in agreement, or agreements, complained of,* whether plaintiff's own purchases or commitments to purchase are viewed by themselves or whether they are viewed as a part of the larger volume of sales connected with the Credit Corporation's entire lending program. . . ."* (Plt.'s Proposed Finding 22)

Plaintiff amplifies this contention elsewhere in its proposed findings (p. 25) by correctly stating that in 1960, 1961 and 1962, respectively, 68%, 70% and 75% of Homes Division shipments were "to dealers receiving financial assistance from the Credit Corporation" and that its "loan *commitments*" in those years totalled $22,625,805, $19,-

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*The Court of Appeals stated, "Insofar as the complaints allege a per se violation due to a tie-in, assuming that the evidence developed is substantially the same as that offered at the first trial, the trial judge may appropriately instruct the jury that the tie-in itself has been established as a matter of law, and that *the amount of commerce affected is 'not insubstantial.'*" (452 F. 2d at 1103, n. 4) Defendants take issue with the underlined portion of the holding of the Court of Appeals and reserve their right to urge on appeal that this conclusion is erroneous as a matter of law. This Court, however, obviously must follow and apply the view of the Court of Appeals.

342,612 and $19,283,544.** Plaintiff erroneously states, however, that all of these loan commitments "contained the tie-in provision *which is the subject matter of this suit....*"

133. Concededly more than 65% of the Homes Division's total sales were accompanied by some kind of financing by the Credit Corporation, and substantially all Credit Corporation lonas were conditioned upon use of the funds to buy or construct Homes Division houses or, in some cases, to acquire or develop land on which such houses would be placed. The record, however, is barren of any evidence as to what proportion of the Homes Division's total sales financed by the Credit Corporation involved land financing (both regular and special) as opposed to financing limited to the purchase or erection of houses.

134. More important, the plaintiff has not challenged even all land financing by the Credit Corporation but only those land loans which were allegedly on uniquely favorable or cheap terms and which plaintiff urges therefore represent the exercise of "sufficient economic power" to bring the per se tying rule into effect. Specifically, plaintiff has offered evidence only that allegedly 100% land financing was purportedly uniquely advantageous and unavailable from any other source in Louisville until 1962 (there is not even a claim of such uniqueness as to the Credit Corporation's regular land financing and financing of the purchase and construction of Homes Division houses).

135. Thus there is no evidence in the record to support any such claim as to financing elsewhere or to any other dealer even in the special land financing category. Apart from the terms of the land financing furnished to

**As the facts of the loan transactions with the plaintiff demonstrate, the commitment represented by loan agreements at any point in time would exceed the volume of loans outstanding since the Credit Corporation was obligated to advance funds only on prescribed progress schedules and amounts advanced similarly were to be repaid on a progress basis before the terminal date of the commitment. (JA 44-74)

the plaintiff, there is no proof as to the terms and conditions on which land financing was extended to any other dealer or that such terms and conditions were in any way "unique," even by the standards urged by plaintiff, in comparison with the land financing terms available from other sources in the other areas where, and at the times when, such financing was granted to any other dealers.

136. Similarly, the record does not support plaintiff's contentions that the tie-in agreements "complained of"* restrained commerce by "resulting in millions of dollars of sales" by the Homes Division. With the sole exception of plaintiff's claims through Mr. Fortner that but for the financing plaintiff would not have bought defendants' houses, there is not a scintilla of evidence in the record as to why any other Homes Division customer bought its houses. Without any evidence in the record, plaintiff merely assumes that other dealers would not have bought the Homes Division's houses "on their merits" but for the Credit Corporation's allegedly unique financing. There is no basis for finding that the Homes Division's total sales, cited by plaintiff, were induced by uniquely favorable financing terms not available from other lenders or that any competitors of the Homes Division were thereby foreclosed in consequence of any financing (whatever its terms) which may or may not have delated to portions of those total sales.

137. The Homes Division sold a total of 1,793 houses in 1960 for $6,746,353 and 1,342 houses in 1961 for $5,-051,992. (JA 957, 962-66, 982-83, 1345-55) By comparison, the other largest competing prefabricated house manufacturers produced the following numbers of houses (JA 884-85):

*The Supreme Court majority opinion makes it clear that the only relevant financing and the only relevant house sales are those "tied by the sales policy under challenge." (394 U. S. at 502)

Year	National Homes	Swift Industries	Inland Homes	Kingsbury Homes
1960.....	16,804	2,500	2,281	1,401
1961.....	18,276	3,000	2,253	2,150

In addition to the fact that the Homes Division had been losing and continued to lose sales while other prefab manufacturers with far larger sales increased their volume, the record also shows that the total number of prefab houses built was 126,867 in 1960 and 156,004 in 1961. (JA 884-85, 961, 1199) As these statistics indicate, while the total number of prefab houses accounted for by all manufacturers significantly increased, the approximate share of the Homes Division declined from 1.4% to .8%. Prior to the arrangements with plaintiff in 1960 and 1961, the Homes Division's sales in Louisville were 13 houses at $60,178 in 1957, 2 houses at $12,261 in 1958, and none in 1959. (JA 1200)

138. Without reference to any figures, plaintiff, elsewhere in its proposed findings (pp. 38-39), argues:

> "Millions of dollars of loans were made under the special financing category as identified in the Underwriting Agreement filed in this case. All of those *loans contained the tie-in provisions.* The Credit Corporation thus utilized very effectively the special financing program *to enable the Homes Division . . . to sell millions of dollars of prefabricated houses.* This is one of the elements of *evidence establishing the economic power or leverage of the Credit Corporation.*"

139. This argument, however, was expressly rejected by the Court of Appeals:

> "In Advance Business Systems & Supply Co. v. SCM Corporation, 415 F. 2d 55 (4th Cir. 1969), cert. denied, 397 U. S. 920, . . . the Court, as the plaintiff argues, interpreted *Fortner* as holding that '. . .

the "sufficient economic power" test of per se illegality is satisfied when it appears that the seller has the power to 'impose other burdensome terms such as a tie-in with respect to any appreciable number of buyers within the market.' Plaintiff in its brief relies upon this interpretation and insists that the directed verdict in its favor was justified on the basis of this interpretation of *Fortner* by the Fourth Circuit. As we read the majority opinion in *Fortner,* the holding was that a tying arrangement achieves an unlawful restraint when 'the seller can exert some power over some of the buyers in the market.' *The majority opinion did not hold that the acceptance of the tie-in by customers without more is proof of economic power.* If the majority had intended to indicate that acceptance of a tie-in by an appreciable number of customers is sufficient proof of the requisite economic power, it would have been sufficient for Mr. Justice Black to have said so and thus to avoid the exhaustive treatment which he gave to the question of economic power in the tying product set forth in other portions of his opinion."* (452 F. 2d at 1103)

C. CONCLUSIONS OF LAW AND AUTHORITIES

1. The Supreme Court's Mandate as To The Per Se Tying Issues To Be Resolved

(a) Power Over The Tying Element Is The Crucial Ingredient To The Rationale Underly The Per Se Rule

Since its decision in Northern Pacific Railway Co. v. United States, 356 U. S. 1, 6 (1958), the Supreme Court has applied a per se rule that tying agreements

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*See also Dam, Fortner Enterprises v. United States Steel: *"Neither A Borrower, Nor A Lender Be,"* 1969 Supreme Court Review 1, 25-26.

". . . [A]re unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."

In this case, plaintiff has relied upon the statment in United States v. Loew's, Inc., 371 U. S. 38, 45 (1962), that "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." Plaintiff has claimed that defendants' financing was "unique" within the meaning of the Loew's decision because it was granted on terms allegedly more favorable than available elsewhere.

In holding that plaintiff was entitled to a trial of its claim, the Supreme Court reiterated its concern that if power is enjoyed in the tying product market it should not be extended to restrain trade in another market by insulating the tied product from competition "on the merits" (i.e., on the basis of price, quality and service), thereby giving the tied product a "free ride" on the vehicle of the transferred power. This is the rationale for the per se rule in the tying area, and power over the tying element is its crucial ingredient.*

*In analyzing the vices which can arise from tying arrangements when the seller has power over the tying product, the Court has stated:

". . . [T]o the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment." Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 605 (1953)

". . . [T]he vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another. . . . They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but

(Footnote continued on following page)

At the same time, the Court has emphasized that "tying arrangements . . . may fall in [the per se] category, though not necessarily so." White Motor Co. v. United States, 372 U. S. 253, 262 (1963). Absent power over the tying element sufficient to restrain competition in the market for the tied product, a tying arrangement is neither anticompetitive nor unlawful. This fundamental premise upon which the per se tying rule is built is articulated throughout Justice Black's opinion in Fortner (e.g., the majority conclusion that credit, like other kinds of goods and services, when used as a tying element *"may . . .* extend the seller's economic power to new markets and foreclose competition in the tied product" but that "advantageous credit terms may be viewed as a form of price competition in the tied product" and a seller can lawfully offer that kind of price reduction as long as he offers "fringe benefits over which he has no economic power" as competitive advantage). (394 U. S. at 508)

because of his power or leverage in another market." Northern Pacific Railway Co. v. United States, 356 U. S. 1, 6, 11 (1958)

". . . [T]he Court should have in mind the rationale on which the illegality of tying arrangements is based. There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competion in the second product. . . . The principal evil at which the proscription of tying aims is the use of power in one market to acquire power in or otherwise distort, a second market. This evil simply does not exist if there is no power in the first market." Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495, 512, 519 (1969) (Dissent, White, J.)

(b) Proof of "Appreciable Economic Power" is Necessary and Turns, In Part, Upon Whether or Not The Tying Product Itself Is Unique or Distinctive

(1) Where the Tying Product Is Unique or Distinctive and Sufficiently Desirable To Yield Higher Than Normal Profits Because An Appreciable Number of Buyers Will Accept a Higher Price to Satisfy Their Stronger Preferences, There is "Sufficient Economic Power"

As a predicate to examining the facts alleged in this case, the Supreme Court discussed in general terms the prerequisites for invoking the per se tying doctrine* and particularly the economic power standard. After quoting from its decision in Northern Pacific** the language explicating the per se tying rationale, the Court stated that the standard of "sufficient economic power" does not require "monopoly or even a dominant position throughout the market for the tying product":

> "Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. . . . As we said in the *Loew's* case, 371 U.S. at 45: 'Even absent a showing of market dominance, the crucial

*While again voicing the view that "tying arrangements *generally* serve no legitimate business purpose that cannot be achieved in some less restrictive way," the Court also reiterated its earlier teaching that not all tying arrangements are unlawful, noting that only ". . . *when certain prerequisites* are met, arrangements of this kind are illegal, in and of tremselves, and no specific showing of unreasonable competitive effect is required." 394 U. S. at 498, 503. In his dissent, Justice White, in cataloging a series of situations in which tie-ins are justified on grounds of affirmatively promoting competition, stated, "Tie-ins may also at times be beneficial to the economy. . . . [T]he fact that tie-ins are not entirely unmitigated evils should be borne in mind." (394 U. S. at 514, p. 9)

**356 U. S. at 5-6.

> economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attribute.' . . . [T]he presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market." (394 U. S. at 502-503)

Specifying some degree of "appreciable economic power" over the tying element as necessary, the majority equated the requisite power to that enjoyed by a seller of a product sufficiently unique, differentiated, or distinctive and desirable* to force at least an "appreciable number of buyers" to accept a "higher price because of their stronger preferences for the product." A seller, Justice Black explained, who has the power to force that many buyers to accept a higher price (a price yielding higher than normal or competitive profits) but who chooses instead to force them to accept a tying arrangement has "sufficient economic power" to invoke the per se tying rule.* In other words, if an appreciable number of buyers find a differentiated or dis-

*Product differentiation or distinctiveness, real or in the minds of buyers, may exist because of uniqueness in intrinsic attributes, patents, copyrights, trademarks or brand names, advertising and promotion or other distinguishing factors not freely or readily reproduced by competitors.

*"Market power is therefore a source of serious concern for essentially the same reason regardless of whether the seller has the greatest economic power possible or merely some lesser degree of *appreciable economic power*. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scattered throughout the market or part of some group within the market—*can be forced to accept the higher price because of their stronger preferences for the product*, and the *seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product.* Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." 394 U. S. at 503-504.

tinctive product uniquely desirable enough to make them pay a premium over the price of its nearest substitute, then the seller has the power, alternatively, to impose a tie-in which will distort competition in the market for the tied product. Stated more succinctly, Justice Black said that if the seller had sufficient power to charge a higher price for his tying product, but instead demanded the tie-in in lieu of the higher price, then the requisite economic power, competitive advantage or leverage would be established. If he elects to impose the tie-in, the seller chooses to forego the premium price and higher than normal profits which he could command in the tying product market in order to buy sales in the tied product market, even though competitors in that market may be as efficient and fully able to compete "on the merits."

(2) Where the Seller Cannot Command a Premium Price Because the Tying Element Is Not Unique or Distinctive, but Rather Is Fungible Like Credit or Money, Then Economic Power Can Be Shown Only By Proof That the Seller Has a Unique Cost Advantage Conferring The Ability To Earn Higher Than Normal Profits Or Other Competitive Advantage Permitting Him to Offer Uniquely Favorable Terms Which Competitors Cannot Meet

Expanding upon the circumstances in which a seller may enjoy economic power over a product, the Court pointed to instances in which the seller's product is differentiated, distinctive, or unique in its attributes and also to the more "confusing" case where the product itself is not differentiated, distinctive or unique but where the seller's economic power arises from his unique "cost advantage in producing it":

> "Uniqueness confers economic power *only* when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, *e.g., International Salt; Loew's,* or physical, as when the product is land, *e.g., Northern Pacific.* It is true that *the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably,* but the uniqueness test *in such situations* is somewhat confusing since *the real source of economic power is not the product itself but rather the seller's cost advantage in producing it."* (394 U. S. at 505, n. 2)

Thus, the uniqueness which confers economic power, as Justice Black indicated, typically exists "only when other competitors are in some way prevented from offering the distinctive product themselves." Only when a product is sufficiently distinctive or unique to convince an appreciable number of buyers that there is no exact substitute can there be the buyer preference (or product "desirability"*) which will permit the seller to command a premium over the price of the substitute.

Where there is economic power over a tying element which is not in and of itself distinctive or unique and which competitors are not legally barred from offering, then, as Justice Black stated, "the real source of economic power is not the product itself but rather the seller's cost advantage in producing it"—an advantage that permits him to realize higher than normal profits which can be used to distort competition in some other market by imposing a tie-in. Earlier, in Northern Pacific, Justice Black had pointed out that where a tying product is undifferentiated or fungible the seller is unlikely to have sufficient economic power to restrain trade in the market for the tied product:

*United States v. Loew's Inc., 371 U. S. 38, 45 (1962).

"As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." (356 U. S. at 6-7)

Using Justice Black's example, if flour were selling at $10 a barrel and it cost all the other stores $9 a barrel but the one store had a unique cost advtantage which saved it $1, then that store could reduce its price to $9 a barrel, still earn a normal profit and to the extent that it could supply the demand, at the same time preclude its competitors from matching its price unless they were to forego all profit. Both the majority and dissenting member of the Court expressly noted that, like flour, money (the "product" placed in the hands of borrowers through financing or credit) is totally fungible—wholly undifferentiated, non-distinctive or non-unique in any way.*

(c) The Majority Held That in an Antitrust Case Summary Judgment Was Improper Not Because Plaintiff's Allegations, if Proved, Would Establish "Sufficient Economic Power" but Because Those Allegations Were Not Inconsistent With the Possibility of Such Power

(1) Proof That 100% Land Financing Is More Favorable or Cheaper Than Available Elsewhere Does Not Prove (or Disprove) Economic Power Over Credit

The Court examined the specifics of the plaintiff's evidentiary claims against these general standards, and the majority concluded not that those claims, if proved, would establish "sufficient economic power" but rather only that

*Justice Black stated that "money is a fungible commodity—like wheat. . . . (394 U. S. at 509). Justice White asserted that "money [is] the most fungible item of trade since it is by definition an economic counter. . . . The [tying] market here is money, a completely fungible item." (Id. at 515, 519)

they "may suggest" or "can reflect" the "*possibility* of market power" in the credit market. (394 U. S. at 504-506)

Justice Black referred to the assertions in the affidavits that plaintiff accepted the tying condition solely because 100% land financing like that which plaintiff finally obtained from the defendants was unusually and uniquely advantageous in that no financing was available at the time "on any such cheap terms from any other source." (394 U. S. at 504-505) In thus emphasizing that there was nothing unique or distinctive about the defendants' money or credit other than its low cost to the plaintiff** and in response to the fact that a low price for a product or service fails to prove either the existence or absence of market power, the Court expressly rejected the plaintiff's contention that such proof alone would establish the "sufficient economic power" essential to a per se tying violation:

> "We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.' We do mean,

**Lending a sum which equals a higher percentage of the collateral or security than others will lend is like charging lower interest. Because of the greater risk in terms of the lender's ability to recover the amount loaned if the borrower defaults, loans comprising a higher percentage of the collatral against which they are granted increase the lender's cost of making such loans and decrease his profit unless he charges more interest. The higher cost of granting higher percentage loans without an upward adjustment of the interest rate is therefore tantamount to lowering the interest rate charged. Just as did the winesses in his case (1978 Tr., pp. 27-28, 95-98, 149, 165), both the majority and dissenting justices of the Supreme Court recognized this fact and agreed that the only allegedly unique aspect of the financing extended to the plaintiff was that it was "cheap." See 394 U. S. at 504 (". . . no such financing was available to his corporation on any such cheap terms from any other source . . ."); id. at 505 ("They could well mean that U. S. Steel's subsidiary Credit Corp. had a unique economic ability to provide 100% financing at cheap rates."); id. at 514-515 ("if . . . U. S. Steel was simply offering credit at a lower price, in terms of risk of loss, repayment terms, and interest rate, surely this does not establish that U. S. Steel had market power by any measure in the money market. There was nothing unique about U. S. Steel's money except its low cost to petitioner."); id. at 517 ("here [credit] was evidently unavailable elsewhere simply because others were not willing to match U. S. Steel's relatively low price for acceptance of high risk.").

however, that uniquely and unusually advantageous terms *can reflect* a creditor's *unique economic advantages* over his competitors."* (394 U. S. at 505)

(2) Other Factors Not Inconsistent With the Possibility of Economic Power

Emphasizing that "since summary judgment in antitrust cases is disfavored . . . the claims of uniqueness in this case should be read in the light most favorable to petitioner,"** the majority of the Court concluded that those claims "could well mean that U. S. Steel's subsidiary Credit Corporation had a unique economic ability to provide 100% financing at cheap rates." The majority pointed to other allegations or lines of proof not urged by plaintiff as evidence of economic power over credit but which could reflect or would be not inconsistent with the possibility of such power.*** Justice Black noted the claim in the plaintiff's

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*Justice White, for the dissenters, stated the same conclusion: "In this case, what proof of any market power in the tying product has been alleged? Only that the tying product—money—was not available elsewhere on equally good terms, and perhaps not at all. Let us consider these possibilities in turn. First, if enough money to proceed was available elsewhere and U. S. Steel was simply offering credit at a lower price, in terms of risk of loss, repayment terms, and interest rate, surely this does not establish that U. S. Steel had market power by any measure in the money market. There was nothing unique about U. S. Steel's money except its low cost to petitioner. A low price on a product is ordinarily no reflection of market power. It proves neither the existence of such power nor its absence, although absence of power may be the more reasonable inference. One who has such power benefits from it precisely because it allows him to raise prices, not lower them, and ordinarily he does so." (394 U. S. at 514-515).

**394 U. S. at 505, citing Poller v. Columbia Broadcasting System, Inc., 368 U. S. 464 (1962).

***Differing with the summary judgment standard followed by the dissenters, the majority held implicitly that where the facts alleged are consistent with either of two or more explanations, one of which would establish an element essential to proof of violation, the plaintiff should be afforded the chance to adduce the additional facts necessary to prove the explanation favorable to his cause of action. Thus, while rejecting plaintiff's argument that unusually attractive or cheap financing terms by themselves prove economic power, the majority held that whether or

(Footnote continued on following page)

affidavits that competitors sold prefabricated houses and built conventional homes for $400 less than the Homes Division's price for comparable models; the claim that for a period of time no financial institution in the Louisville area had matched the defendants' terms; and, judicially noticing various statutes, the majority also assumed that other sources of credit "such as banks and savings and loan associations may have been prohibited from offering 100% financing by state or federal law." The Credit Corporation, Justice Black stated, "on the other hand, *may* well have had a substantial competitive advantage in providing this type of financing because of economies resulting from the nationwide character of its operations." (394 U. S. at 506)

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not such power exists depends on whether the lender has a unique economic ability or cost advantage permitting him to offer such cheap terms when other lenders cannot. Justice White and the other dissenters, agreeing that the plaintiff's affidavits were not inconsistent with a "possibility of market power," applied different summary judgment standards than did the majority. It was the dissenters' view that summary judgment should be reversed only if the plaintiff offered facts that would be conclusive if proved true. Because the plaintiff offered to prove "sufficient economic power" solely by showing that the defendants' financing was more favorable or cheaper than available elsewhere, the dissenters voted to affirm on the ground that the plaintiff failed to offer "any independent proof whatever of such market power." (394 U. S. at 516) Justice White stated:

> "I agree with the majority that the affidavits are not *inconsistent* with a 'possibility of market power' and that such power might be shown by showing certain kinds of 'unique economic ability.' But I cannot see how petitioner offers to prove this, although by taking judicial notice of the possibility that U. S. Steel may have operated free of legal restraints on other lenders, willing to provide 100% financing—a possibility not mentioned by petitioner—the majority suggests to petitioner an element of the sort of detailed description of one facet of the credit market which, with much more information about the whole of the market, would be relevant. But this was not the basis on which petitioner offered to go to trial and I would not remand for trial even under the applicable *Poller* standard." (Id. at no. 10) (Emphasis in original)

(d) To Establish That Defendants Had Economic Power Over Credit, Plaintiff Must Prove That They Were Uniquely Able to Offer Financing At Cheaper Rates Because Other Lenders Were Legally Barred From Offering Equally Cheap Rates Or Because Defendants Had Unique Cost Advantages in the Credit Market

In summary, the Supreme Court made it clear that a cheaper price or more favorable terms for the tying element will not establish that the seller has "sufficient economic power." Instead, the Court held, the plaintiff here must show that other lenders were not able to offer equally cheap or favorable terms because precluded by a unique competitive advantage or economic power enjoyed only by the Credit Corporation. As the Court stated, "Uniqueness confers economic power *only* when other competitors are in some way prevented from offering" the same product on the same terms. (394 U. S. at 505, n. 2)

The Court identified the situations where a uniquely low price on an undifferentiated or fungible tying element like credit or money may foreclose competitors in the tied product market as those in which the seller is shown to have a competitive advantage in the market for the tying element because of (1) his having a cost advantage and higher rate of profit in the tying market or (2) his competitors in that market being prohibited by law from matching his low price.

Therefore, as Justice Black indicated, in this case where the only thing peculiarly attractive or unique about the tying element was its allegedly low price compared with the identical product (money) available from many other sources, the proper inquiry is whether the "Credit Corporation had a unique economic ability to provide 100% financing at cheap rates" in that others were barred from offering such financing by law or by the fact that the Credit Corporation "had a substantial competitive advantage in

providing this type of financing" be cause it had "achieved economies of scale in [its] credit operations. . . ." (394 U. S. at 505, 506, 509)

Upon this analysis, the majority reached the limited holding that "the pleadings and affidavits sufficiently disclose the *possibility of market power* over borrowers in the credit market to entitle petitioner to go to trial on this issue." The Court noted, however, that the allegations of market power "may . . . not be sustained when the case goes to trial" and that "it may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market." (394 U. S. at 506)

2. The Opinion of the Court of Appeals

While recognizing that this Court must follow the analysis of the Court of Appeals, defendants urge that with regard to the per se tying requirement of "sufficient economic power" the opinion of the Court of Appeals was erroneous in one respect. Defendants respectfully preserve their right to so urge in connection with any appeal. While following much of the Supreme Court's exposition, as set forth here, the Court of Appeals believed that the two sources of economic power or advantage in the credit market specified by Justice Black were not the sole possible sources of such power. The Sixth Circuit stated:

> "It was apparently the view of the [Supreme] Court that . . . [Fortner] must prove that the 'unique and unusual' terms offered by the Credit Corporation reflected some unique economic advantage over its competitors. The Court pointed to *two possible* sources of such advantage: (1) competitors in the credit market might be legally precluded from offering credit on such

terms; and (2) the Credit Corporation might enjoy some cost advantage not shared by potential competitors in the relevant credit market in Louisville. *The Court did not preclude the possibility of other sources of leverage."** (452 F. 2d at 1101)

At the same time, as noted earlier in the findings, the Court of Appeals clearly held that the plaintiff "must prove

*It is the position of the defendants that not only the opinion of the Supreme Court but economic logic, as well, compel the conclusion that a lender could have economic power in a credit market populated by many lenders only if he enjoyed one or both of the competitive advantages articulated by Justice Black. In an unreported opinion on December 21, 1973, in Carlson Companies, Inc. v. The Sperry & Hutchinson Co., D. Minn. (4th Div.), No. 4-72-Civ. 327, Judge Larson analyzed the Supreme Court's decision as defendants do: "In analyzing the 'economic power' requirement for a finding of a Sherman Act antitrust violation, the Court in *Fortner* adopted the 'uniqueness' standard that had been enunciated in earlier cases involving patents, . . . copyrights, . . . or land. The uniqueness criterion had not been doctrinally difficult to apply because of the traditional unduplicative qualities of a legally protected quantity—patents or copyrights—or a separate physical quantity—land. In considering the uniqueness of Fortner's loans, however, the Court was dealing with the new area of economic uniqueness. In *Fortner*, the Court indicated that barriers may result from the *inability of competitors to produce the distinctive product profitably* and that economic power is conferred only when other competitors are in some way prevented from offering the distinctive product themselves.' 394 U. S. 505. n. 2. Thus it becomes apparent that the court in an economic uniqueness case must look to the economic ability of competitors to offer similar programs before an antitrust violation may be found." Edwin M. Zimmerman, formerly the Assistant Attorney General in charge of the Antitrust Division, has publicly analyzed the Supreme Court decision as follows: "[W]hat market power means is that you do not have to cut your price; that you can, in fact raise your price or in lieu thereof, require the tie. . . . [W]hat the majority had in mind . . . is the notion that U. S. Steel alone was able to offer this type of credit because its competing financial institutions were barred by legal regulation . . . [or] as an alternative possibility which requires further proof, that U. S. Steel possessed some unexploited market power. This is to say, all along it could have lowered its prices on credit substantially and still made a profit. . . . Conceivably, for some reason, it could have done this in a way that its competitors could not emulate. . . . [O]n remand, U. S. Steel would be free to prove that all it was doing was cutting its price and that competitors could have done so as well, in which case it has no power. The plaintiff could prove that U. S. Steel was in a unique position either because of regulatory restraints on competitors or because it had unexercised market power in that it had certain advantages which others simply could not emulate." Recent Trends in Supreme Court Antitrust Decisions, Past, Present and Future, 38 Antitrust Law Journal, 602, 615 (1969). See also The Supreme Court, 1968 Term, 83 Harv. L. Rev. 235, 241 (1969) ("Because the money market is composed of many sellers and the product is fungible, the only arguable basis of power in credit is greater efficiency.")

that the 'unique and unusual' terms offered by the Credit Corporation reflected some unique economic advantage over its competitors" and stated that the question to be resolved here is "whether competitors in the Louisville credit market were precluded from offering credit on such terms" —"whether the finance subsidiary has a unique advantage over financial institutions and other competitors in the lender's market." (452 F. 2d at 1101, 1102)

3. The Plaintiff Has Failed to Prove by a Preponderance of the Credible Evidence That the Defendants Had the Economic Power or Competitive Advantage in the Credit Market Necessary to Establish a Per se Tying Violation of the Sherman Act.

Based upon the preceding findings of fact and case analysis and applying the principles mandated by the Court of Appeals on its remand of this case, it must be concluded as a matter of law that the plaintiff has failed to prove by a preponderance of the credible evidence that the Credit Corporation, either alone or based upon its relationship to U. S. Steel and the Homes Division, had the economic power or competitive advantage or leverage necessary to establish a per se tying violation, i.e., sufficient economic power with respect to the tying element, credit, to appreciably restrain free competition in the market for the tied product, houses (whether prefab houses alone or prefab and conventional houses together).

Contrary to the first possible indicium of tying element power discussed by Justice Black and the majority of the Supreme Court, the record shows no ability on the part of the Credit Corporation to force any bororwers, let alone an "appreciable number," to accept a "higher price because of their stronger preferences" for the Credit Corporation's financial services. (394 U. S. at 503-504) The record is

barren of any evidence and, indeed, there is no contention by the plaintiff that anybody would have paid the Credit Corporation higher prices or accepted less favorable terms from it than could be obtained from other lenders. This is necessarily true because money is totally fungible—wholly non-distinctive, non-unique in any way—and there are many sources lending money so that no borower will pay one lender more for credit or financing than he will pay another.

Even if the plaintiff had not failed to prove that the Credit Corporation's land financing (whether or not equivalent to 100% of the value of the land which secured the loans) was uniquely favorable or cheaper than available from other sources, it is clear that any such fact would not prove the requisite economic power or competitive advantage, as both the Supreme Court and Court of Appeals clearly held. Market power can not be inferred simply because the financing terms offered by a lender are unique and unusual or cheaper than offerd by other lenders.*

Even if the evidence did not fail to prove that the Credit Corporation's loans to the plaintiff were 100% of the value of the land security and even if its loans had been shown to be on more favorable terms than those avail-

*That this conclusion is sound even apart from economic analysis is illustrated by the fact that the loan terms negotiated by Mr. Fortner were proposed and ultimately demanded by him. In Centanni v. T. Smith & Son, Inc., 216 F. Supp. 330, 334-35 (E.D. La. 1963), aff'd. per curiam, 323 F. 2d 363 (5th Cir. 1963), the plaintiffs alleged a per se tying violation based upon the offering of lines work at no charge conditioned upon the use of the defendants' tugboat towing services. While crediting testimony that the customer would have used the tugboat services even without the free lines service, the court found the allegations further defective by reason of the plaintiffs' failure to prove that the defendants possessed the economic power to coerce customers into using the tugboat services, stating, "None of the evidence elicited in connection with this transaction indicates that States Marine was in any way coerced or offered any illegal or improper concessions in any of its dealings with the Smith enterprises. It was in the position of demanding concessions rather than bowing to conditions dictated by others." (Id., at 335) When cheaper prices or more favorable terms can arise in such circumstances as these, it is apparent that no inference of economic power can be reasonably drawn simply from the fact that such terms were given.

able at the time from other lenders, the Credit Corporation's ability to grant such loans was not unique in the sense that no other lenders could lawfully make such loans. Many other lenders were legally free to make even 100% land loans and essentially all lenders were legally free to offer financing embodying equally desirable terms considered in the aggregate, even if not 100%.

The Credit Corporation, even giving full consideration to its relationship with U. S. Steel and the Homes Division, had no unique cost savings or higher rate of profit which precluded other lenders from making loans on terms equally attractive, favorable or cheap to those of any loan the record shows the Credit Corporation made. As the Court of Appeals found, "There is no showing in the record that there were lenders in or out of Louisville having higher costs or lower profitability than the Credit Corporation." (452 F. 2d at 1102) Instead, the record as now constituted shows that other lenders in Louisville and elsewhere had higher earnings in relation to net worth than did the Credit Corporation.

If the Credit Corporation had in fact enjoyed a cost advantage, it could have earned higher-than-normal or competitive profits. Alternatively, the Credit Corporation could have reduced its prices for credit below those other lenders could profitably charge and still have earned a normal profit, in which event imposing a tie-in could distort competition in the tied product market because of the power or cost advantage enjoyed in the credit market. Lacking such cost advantage, however, any cheaper rates the Credit Corporation may have charged for credit merely reflected the willingness of the defendants to forego the normal profit on credit enjoyed by other lenders in order to promote the sale of prefabricated houses by assisting Homes Division dealers.

The Homes Division guaranty of the special land financing did not confer upon the Credit Corporation any competitive advantage precluding other lenders from making loans equally attractive or favorable to the borrower in comparison with any made by the Credit Corporation. Rather the evidence demonstrates that, even protected against loss by the guaranty, the Credit Corporation's costs were higher and its rate of profit lower than those of many other lenders. Moreover, if any losses were incurred on land financing underwritten by the Homes Division, those losses were charged against its sale of houses in the tied product market.

Any ability to bear such losses, therefore, in no way represented the economies of scale, cost advantage and higher rate of profit in comparison with competing lenders in the tying or credit market which the Supreme Court majority postulated as essential to proof of the requisite economic power or unique competitive advantage which would preclude other lenders from making equally favorable loans. Further, the record establishes that from soon after the financing of the plaintiff other lenders in Louisville, willing and able, have granted 100% land financing without any guaranty. That evidence not only shows that the defendants lacked any unique ability to grant the kind of financing alleged by plaintiff but also demonstrates that even if they had made loans of 100% of the value of the land such financing is not predatory, profligate or, in totality, a losing business.

Even if the record supported plaintiff's contention that the Homes Division's houses were overpriced at an artificially high level, the evidence conclusively establishes that at the times it asked for and received financing plaintiff did not consider the houses either overpriced or otherwise undesirable. Absent such proof, plaintiff has failed to

support a claim of the character contemplated by the Supreme Court majority and which those justices said plaintiff should have the opportunity to prove (i.e., that where a buyer knowingly assumes a burden by agreeing to take a tied product he deems less desirable than a competing brand such evidence may support an inference that the seller has some power over the tying product, at least where it is not a fungible commodity).

Since the tying element here (money or credit) was wholly fungible and the only thing unique about it was its allegedly cheaper price, even if plaintiff at the time of the transactions had deemed the Homes Division houses inferior for any reason it would have accepted them only if it considered the alleged savings on financing at least compensatory.

Plaintiff has wholly failed to prove that the Credit Corporation and U. S. Steel have, in the words of Justice Black, "achieved economies of scale in their credit operations . . . [which could] be used to exert economic power over other products that the company produces." (394 U. S. at 509) Plaintiff has also failed to prove any other basis for finding that the Credit Corporation has any "unique economic advantage over its competitors" whereby they "were precluded from offering credit on [its] terms," as the Court of Appeals stated the issue to be resolved here. (452 F. 2d at 1101, 1102)

That plaintiff should fail to make this essential showing is not surprising. If in fact the defendants had any economic power or competitive advantage in the credit market, they would hardly have limited the Credit Corporation's financing activities just to supporting the Homes Division's modest volume of business in prefabricated houses. Rather U. S. Steel would have devoted to the business of financing more of its assets than the $1 million capital and $1 million loan it extended to the Credit Corporation and would have

made credit available far more generally in order to reap the higher than normal profits which are the hallmark of the economic power or advantage essential to proof of a per se tying violation.

The plaintiff's own evidence has established that other lenders can and have granted even 100% land financing. This undisputed fact destroys any contention that defendants had any unique ability to offer even that kind of financing. To urge that the economic power essential to finding a per se tying violation can be established solely on the basis of the defendants' willingness to assume even greater risk (even if that were established by the record) before other Louisville lenders were stimulated to do so is inconsistent with the antitrust policy of promoting competition and low prices. Absent proof of economic power, as Justice White said in his dissenting opinion,

> "A seller who is willing to take credit risks which no one else finds acceptable is simply engaging in the hard and risky competition which it is the policy of the Sherman Act to encourage. And if he may not do so, then those businesses and entrepreneurs who depend for their survival and growth or for the initiation of new enterprises on the availability of credit financing from sellers may well fail for lack of credit availability from other sources. . . .
>
> ". . . Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller is merely competing in the tied product market. Buyers are not burdened. They may buy both tied and tying products elsewhere on normal terms. Nor are the seller's competitors restrained. The

> economic advantage of the tie-in to buyers can be matched by other sellers of the tied product by offering lower prices on that product. Promotional tie-ins effected by underpricing the tying product do not themselves prove there is any market power to exercise in that product market, unless the economic resources to withstand lower profit margins and the willingness to compete in this manner are themselves suspect. . . ." (394 U. S. 517, 518)

Similarly, Justice Black and the majority of the Supreme Court recognized that, like the offer of any other tying product on advantageous terms, "advantageous credit terms may be viewed as a form of price competition in the tied product. . . ." They concluded that a seller can achieve that objective as long as he offers "fringe benefits over which he has no economic power." (394 U. S. at 508) As stated earlier, they expressly noted that the plaintiff's allegations of economic power "may . . . not be sustained when the case goes to trial" and that "it may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market." (394 U. S. 506) The combined record of two trials has transformed that contingency to unassailable fact.

4. The Plaintiff Has Failed to Prove By a Preponderance of the Credible Evidence That, Measured By the Rule-of-Reason, There Was Any Violation of the Sherman Act.

Plaintiff now treats as a mere afterthought its prior alternative claim that, if the arrangements it has challenged are not a per se tying violation, they nonetheless constitute a conspiracy to restrain trade and to monopolize

in violation of Sections 1 and 2 of the Sherman Act as determined by the rule-of-reason standard. In fact, plaintiff appears to drop any claim of such a Section 1 violation. Its proposed findings (p. 40) state:

> "Since this Court has found a *per se* violation of Section 1 of the Sherman Act by the defendatns pertaining to the illegal tie-in agreement, as described above, it is actually not necessary for this Court to decide whether the plaintiff has established a conspiracy to monopolize violative of Section 2 of the Sherman Act. However, since there may be an appeal of this action, the Court in the alternative does find that all of the elements of a conspiracy to monopolize do exist in this record."

Defendants contend that no violation of the Sherman Act other than the alleged per se tying violation is properly before this Court for resolution. At the first trial, the verdict directed by the Court was limited to a per se tying violation of Section 1, and it was only that violation of the antitrust laws which the jury found caused damage to the plaintiff in the amount of $93,200. In directing the verdict on liability, the Court told the jury:

> "The arrangement whereby the defendants, the Steel Corporation and the Credit Corporation required the plaintiff, Mr. Fortner, to purchase and erect in its Golden Meadows Subdivision only prefabricated house packages purchased from the Homes Division of the United States Steel Corporation is what we call in the law a tying arrangement.
>
> "The defendant, United States Steel Homes Credit Corporation possessed sufficient economic power to induce its customers to purchase the tied products, the house packages, and a not insubstantial dollar volume

> of interstate commerce in the tied product has been adversely affected.
>
> "The Court therefore holds, as a matter of law, that this particular tying arrangement is illegal under the antitrust laws of the United States and both defendants, the Steel Corporation and the Credit Corporation are responsible for it under their conspiratorial agreement.
>
> "Accordingly, I instruct the juror, Mr. Manion Johnson, come forward and sign on your behalf the directed verdict in favor of the plaintiff against the defendants on the issue of liability." (JA 1063-64)

Thus the verdict directed at the first trial was limited to the plaintiff's contentions that the defendants' alleged conspiracy in violation of Section 1 of the Sherman Act was a per se tying violation. The elements set forth were only those which establish a per se tying violation. The verdict directed by the Court did not refer to any Section 2 violation and did not explicate any of the elements essential to finding such a violation, including, inter alia, the specific intent to monopolize requisite to that offense. Similarly, the Court did not set forth any of the elements requisite to a rule-of-reason violation of Section 1.

Plaintiff, too, recognizes that the directed verdict on the liability issues was limited to a finding of just a per se tying violation. In its proposed findings (p. 2), plaintiff states, ". . . this Court felt that the undisputed facts established all of the elements of an illegal tie-in arrangement which constituted a per se violation of Section 1 of the Sherman Act by both defendants and, therefore, directed a verdict for plaintiff as to liability."

It follows, therefore, that when the jury at the first trial found for the plaintiff on the issue of damages it found, and

could have found, only that a per se tying violation had caused the plaintiff damage. It did not and could not find that plaintiff had been damaged by any other antitrust violation, because the verdict directed by the Court allowed the jury to decide only whether a per se tying violation, determined by the Court as a matter of law, had been the proximate cause of any damage to the plaintiff.

In these circumstances, because the Court of Appeals has limited the new trial to a determination of whether defendants are liable for the damages found at the first trial, the question whether there was any conspiracy to monopolize in violation of Section 2 or any violation of Section 1 by general standards is no longer properly before the Court. A finding of any such violation could not sustain a judgment, since there was no finding of damages attributable to any such violation at the first trial. Rather this Court's determination must be limited to deciding whether the defendant's land financing arrangements with the plaintiff constituted a per se tying violation of Section 1, the only offense found by the jury at the first trial to have caused plaintiff any damage.

Without waiving their rights on appeal as to this point, defendants urge that there is no basis in fact or law for finding a violation of either Sections 1 or 2 of the Sherman Act, measured by the rule-of-reason standard. The tie-in is the basic conduct challenged, and plaintiff's failure to prove that defendants had the requisite economic power or competitive advantage over credit to place the challenged arrangements within the ambit of the per se tying rule places a far heavier burden upon the plaintiff. Thus, in Northern Pacific Railway Co. v. United States, 356 U. S. 1, 5-6 (1958), the Supreme Court, in setting forth the rationale for the per se rule, emphasized that where the rule is applicable it ". . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . to

determine at large whether a particular restraint has been unreasonable."

Similarly, in this case the Court stated that absent proof of a per se tying violation a plaintiff could prevail only by proving, "on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated." (394 U. S. at 500) Because the plaintiff relies upon no other evidence than it cited as proof that the tying arrangement here was a per se violation, defendants submit that any claims based upon the rule-of-reason standard fall of their own weight.

Plaintiff has failed to prove the economic power over credit requisite to establishing a per se tying violation. Tying arrangements are deemed evil only when power or advantage enjoyed in the tying market is used to distort competition on the merits in the tied product market. As Justice White noted in this case,

> "The principal evil at which the proscription of tying aims is the use of power in one market to acquire power in, or otherwise distort, a second market. This evil simply does not exist if there is no power in the first market." (394 U. S. at 519)

And as noted at pages 112-113, the majority opinion not only took no issue with that fundamental proposition but expressly noted that, absent economic power, a seller can offer advantageous terms on one product or service conditioned upon the purchase of a second product as a means of lawfully competing in the market for that second product. (394 U. S. at 508, 509)

Even if plaintiff's contentions were proved, the tying element here, credit, is unique solely because it was allegedly offered on cheaper or more favorable terms. Without power or competitive advantage in the credit market, defendants'

offering of such credit is nothing more than a promotional device enhancing competition in the tied product market. The price of the tied product, houses, is for all effects and purposes reduced if the tying credit is sold at lower than prevailing prices. If the defendants had offered financing terms which even the plaintiff would concede were available everywhere and at the same time had reduced the prices of their houses, there could be no claim that the Sherman Act had been violated. The net economic effect, however, is exactly the same when it is the price of the financing which is reduced.

Although the financing granted to plaintiff extended beyond just the purchase of the Homes Division's houses and covered the acquisition and development of the land on which the houses were to be placed, such financing is like a variety of other services or goods offered on advantageous terms in promoting and supporting the sale of goods. For example, as Justice Fortas noted in this case (394 U. S. at 524, 525), sellers furnish to their buyers technical advice, sales assistance, cooperative advertising and promotional services, store equipment, and other items which promote not only the seller's goods but the overall business of the buyers as well. All of these items, in purpose and effect, amount wholly or in part to reductions in the price of the seller's goods.

Again, as noted earlier, Justice Black and the majority of the Supreme Court expressly recognized that, like the offer of any other tying product on advantageous terms, "advantageous credit terms may be viewed as a form of price competition in the tied product. . . ." They concluded that a seller can achieve that objective as long as he offers "fringe benefits over which he has no economic power." (394 U. S. at 508) Moreover, the uncontradicted evidence is that the Credit Corporation was organized and its lending practices designed to meet the competition of

other house suppliers by assisting dealers where financing was not available to them from local banks. (JA 955, 957-58, 961, 972, 990-91)

Although its evidence is limited to Louisville and even there only prior to 1962, plaintiff claims that the credit extended to it and some others (as to whom there is no supporting proof) was more favorable than available from other sources. But even if that had been proved, there is no evidence that any other lenders, whether defendants' competitors in the housing market or those in the credit market, were unable to offer equally favorable terms. In fact, the plaintiff's own evidence demonstrates that even in Louisville traditional or conventional lending sources, and not merely other sellers in the housing market, were stimulated by competition to grant even 100% land financing.

Not only is dealer financing by sellers commonplace throughout the economy, but challenges to such financing have been few and have involved the imposition of exclusive dealing as a condition to the financing. In Hastings Mfg. Co. v. FTC, 153 F. 2d 253 (6th Cir. 1946), loans to dealers as part of an inducement not merely to handle the seller's line of goods but to discontinue handling all competitive products were found to be an unfair method of competition under Section 5 of the Federal Trade Commission Act only where part of an aggressive anticompetitive program which resulted in the respondent's growth from sixth to second largest seller in its industry. The Court of Appeals, however, noted, "It is not illegal for a manufacturer to finance his retail outlets. . . ." (Id., at 257) In the so-called "Ice Cream Cases," the Commission upheld dismissal of complaints based in part upon dealer financing, conditioned upon exclusive dealing, for failure to prove the requisite competitive effect. Carnation Co., 60 F.T.C. 1274 (1962)

Thus, in these cases applying the Federal Trade Commission Act, a statute with far less demanding standards for establishing violation than those of the Sherman Act, and involving exclusive dealing by numbers of dealers with total foreclosure of competitors from access to their business, there was no suggestion that conditioning dealer financing upon the non-exclusive purchase of the supplier's products was unlawful. Moreover, even if the defendants' financing involved exclusive dealing requirements (as plaintiff stipulated it does not—JA 334), there is no evidence in the record as to the requisite degree of foreclosure to constitute a violation even within the broader proscription of Section 3 of the Clayton Act, let alone the narrower ambit of Sections 1 and 2 of the Sherman Act. See Tampa Electric Co. v. Nashville Coal Co., 365 U. S. 320 (1961)

In fact, while the financing extended was to be used, unless repaid, only for Homes Division houses, plaintiff and all others were free at the same time to use their own money or that borrowed from traditional lending sources or other sales finance companies like the Credit Corporation to buy any number of other houses they chose from U. S. Steel's competitors. Similarly, there is no evidence or claim that the defendants engaged in any predatory conduct by offering credit at prices below cost, either defendants' or any other lender's. Indeed, there is no evidence that any competitor in the housing market failed to sell a single house or that any buyer failed to purchase any houses from competitors because of defendants' financing (with the sole exception of plaintiff's claims that but for the financing it would not have bought defendants' houses and that if defendants had consented it would have used the money obtained from the Credit Corporation to buy other houses when it became dissatisfied with those of the Homes Division).

In light of plaintiff's own evidence that normal lending sources even in Louisville responded to the allegedly uniquely favorable terms of the Credit Corporation and others, it clearly can not be argued that the Homes Division's competitors are foreclosed. Even if they choose not to or are unable to match the defendants' financing, their customers can turn to independent financing sources for the same or comparable terms. All that the record shows is that the defendants' financing and that of others have aided developers who might not otherwise be able to build houses, at the same time prompting more competitive prices and terms from traditional lenders in the credit market.

Concededly defendants' financing "restrained" customers to use defendants' money for the purchase, placement and erection of the Homes Division's houses. All transactions, however, restrain the particular parties to them in one way or another, but unless the restraint is predatory, unfair or undue and has substantial effect in foreclosing competition the restraint is not unreasonable in violation of Section 1 of the Sherman Act. *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911) Here there is no proof that the restraints incident to defendants' financing were predatory, unfair or undue or foreclosed competition in the sense of the statute.

In view of the plaintiff's failure to prove that the defendants had any economic power over the tying element, credit, this case presents essentially the same factual pattern analyzed by the Supreme Court in one of the earliest tie-in cases. In FTC v. Sinclair Refining Co., 261 U. S. 463 (1923), even under the more stringent, more easily established standards of Section 3 of the Clayton Act, the Court approved the leasing of unpatented gasoline pumps at nominal, non-remunerative rates on the condition that only the lessor's gasoline be dispensed through them. Even though the pumps were offered on unique terms more favorable to the dealers than those available from other sources

and even though the rates charged did not represent a reasonable return upon the gasoline supplier's investment, the Court recognized that such tie-ins serve legitimate business purposes (just as the Supreme Court majority stated might turn out at trial to be the case here). The Court stated:

> "No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads." (261 U. S. at 475)

In support of its contentions that the defendants conspired to monopolize in violation of Section 2, plaintiff urges in its proposed findings (pp. 40-41) that the defendants "conspired to threaten to enforce or enforce the tie-in provisions of the loan agreement by threatening foreclosure on Fortner Enterprises' property and taking certain steps to commence the foreclosure procedure." The record shows only that (after plaintiff announced it would not continue its project, that it was without funds, and that it would sue) defendants audited plaintiff's books, demanded payment following delinquency, and asserted their compulsory counterclaim for foreclosure after this suit was instituted by plaintiff.

Even if the facts were as plaintiff characterizes them, however, they fail to establish a conspiracy to monopolize or any other antitrust violation. This contention is like plaintiff's argument earlier in this proceeding to the effect that the defendants' insistence upon plaintiff's compliance with the tie-in requirement evidenced a conspiracy to

monopolize. The question is not whether defendants took steps to enforce their rights under the agreement but whether that agreement, with its requirement that the funds be used only in connection with defendants' houses, is unlawful either as a per se tying violation or some other violation of Sections 1 or 2 of the Sherman Act. Unless the underlying tying arrangement was itself unlawful, steps to protect the defendants' rights in connection with it could not themselves be an unreasonable restraint of trade or conspiracy to monopolize.

Plaintiff also urges as proof of a conspiracy to monopolize that the defendants "conspired to increase sales" and that "the sole purpose of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages and that the implementation of the program constitutes the necessary evidence of intent to monopolize required." (Plt.'s Proposed Findings, pp. 40-41)

While defendants concededly intended their financing to promote and increase the sales of their houses, there is no evidence to support plaintiff's contention that their intent was "to increase [their] *share* of the market." Even if there were such evidence, however, an intent to increase one's sales or even one's minimal share of the market does not prove the kind of intent requisite to establishing a conspiracy to monopolize.

Unlike the offense of monopolization, an attempt or a conspiracy to monopolize requires not just the "deliberateness" to do the acts challenged but a specific or subjective intent to accomplish the unlawful result of monopolization, i.e., to destroy or control competition by obtaining monopoly power as, for example, by driving competitors out of busi-

ness.* More specifically, in United States v. Aluminum Co. of America, 148 F. 2d 416, 431-432 (2d Cir. 1945), the Second Circuit analyzed Section 2 and distinguished between the mere general intent that will sustain a finding of monopolization and the more demanding specific intent to achieve monopoly power which is essential to proof of attempts and conspiracies to monopolize:

> ". . . Although the primary evil was monopoly, the Act also covered preliminary steps which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves *in a plan or scheme which, carried out, will result in monopoly,* they are dangerous and the law will nip them in the bud. For this reason conduct falling short of monopoly, is not illegal unless it is part of a *plan to monopolize,* or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in the criminal law is known as a 'specific intent'; an intent which goes beyond the mere intent to do the act. . . ."

Following the Supreme Court's definition in Times Picayune Pub. Co. v. United States, 345 U. S. 594, 626 (1953), of specific intent as an intent "to destroy competition or build monopoly"** the courts of appeals have uniformly held that specific intent requires proof of an intent to acquire monopoly power (the power to control price and exclude competition).

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*American Tobacco Co. v. United States, 328 U. S. 781, 786, 789 (1946); United States v. Yellow Cab Co., 332 U. S. 218, 229-230 (1947); Swift & Co. v. United States, 196 U. S. 385, 396 (1905); United States v. Consolidated Laundries Corporation, 291 F. 2d 563, 573 (2d Cir. 1961); Gold Fuel Service, Inc. v. Esso Standard Oil Co., 306 F. 2d 61, 64 (3rd Cir., 1962).

**Such intent was found by the Supreme Court in Lorain Journal v. United States, 342 U. S. 143, 149-151 (1951), where the defendant's conduct "was aimed at a larger target—the complete destruction and elimination" of its sole competitor for local advertising by "bold, relentless and predatory" behavior.

In American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), aff'd, 323 F. 2d 124 (4th Cir. 1963), the Fourth Circuit stated, "It is elementary that in order to find the offense of conspiracy or attempt to monopolize, there must be a specific, subjective intent to gain an illegal degree of market control," which it found inconsistent with the "substantial business and economic reasons for advocacy by National League owners of the planned expansion." (Id., at 132 and n. 18) The Ninth Circuit, in Independent Iron Works, Inc. v. United States Steel Corp., 322 F. 2d 656, 667 (9th Cir. 1963), held that the plaintiff had the burden of proving that the defendant's acts were "not 'predominantly motivated by legitimate business aims,' but instead were done in order to gain monopoly power."

The Court of Appeals for this Circuit has been no exception. In Daily Press, Inc. v. United Press International, 412 F. 2d 126, 135 (6th Cir. 1969), cert. denied, 396 U. S. 990 (1969), that Court stated that the specific intent necessary to establish an attempt or conspiracy to monopolize is a "specific intent to monopolize." See also, Alles Corp. v. Senco Products, Inc., 329 F. 2d 567, 572 (6th Cir. 1964) and Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co., 360 F. 2d 79, 80 (6th Cir. 1966), cert. denied, 393 U. S. 844 (1968). In the latter case, the defendant, a gas utility with a total monopoly in the gas market, allegedly sold gas appliances at or below cost. Yet the Court rejected an attempt to monopolize claim, finding that the defendant's purpose was not to monopolize the gas appliance market but rather to increase its sales in the primary gas market.

That no specific intent to acquire monopoly power, destroy competition or otherwise monopolize the market for prefab houses (or for those and conventional houses together) can be inferred here is patent from even the most

cursory listing of the salient facts of record. The Homes Division had been losing and continued to lose sales while other prefab manufacturers with far larger volume increased their output as the total number of prefab houses sold by all manufacturers significantly increased. Its approximate share of prefab sales in the years in question, 1960 and 1961, fell from a miniscule 1.4% to a de minimis .8%. The target of 1800 units it sought with the assistance of the Credit Corporation was less than 2% of total prefab sales, and even that target was not achieved. The Homes Division's substantial losses far exceeded the Credit Corporation's modest profits. Their financing was not on predatory below-cost terms. The organization of the Credit Corporation and the adoption of its special financing program were responses to the financing activities of competing prefab manufacturers and their credit affiliates. In short, the record shows only that the defendants were attempting, however unsuccessfully, to reverse the Homes Division's deteriorating position and to compete more effectively in selling its houses.

CONCLUSION

For all of the above reasons, judgment should be entered for the defendants dismissing the complaint.

Respectfully submitted,

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April 15, 1974

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BACKGROUND OF THIS LITIGATION

This action was originally filed in 1962 and has had a long history in this and the Appellate Courts since then. Plaintiff, Fortner Enterprises, Inc., is claiming violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C., Secs. 1 and 2. In 1966 this Court sustained the Motions of defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation] dismissing plaintiff's Complaint as amended [293 F. Supp. 762]. The Sixth Circuit Court of Appeals affirmed without Opinion.

The Supreme Court reversed and remanded the action to this Court with directions for the case to proceed to trial. Fortner Enterprises v. United States Steel Corporation, 394 U. S. 495 [1969]. The Supreme Court's comprehensive Opinion set forth the guidelines for this Court to follow in trying this case before a jury.

During the month of June, 1970, this case was tried before a jury. At the close of all the evidence both plaintiff and defendants moved for directed verdicts on liability. After considering the evidence presented in light of the Supreme Court's Opinion, this Court felt that the undisputed facts established all of the elements of an illegal tie-in agreement which constituted a per se violation of Section 1 of the Sherman Act by both defendants and, therefore, directed a verdict for plaintiffs as to liability. The questions of causation [fact of damage] and amount of damages were submitted to the jury which found for plaintiff and awarded a verdict of $93,200.00. That sum was duly trebled in accordance with the antitrust laws and attorneys' fees and costs were awarded.

Defendants filed Motions for Judgment N.O.V. and New Trial which were overruled. Defendants then appealed to the Sixth Circuit which reversed in part only at 452 F. 2d 1095. The Sixth Circuit found that the facts were undisputed as to two of the three elements of an illegal tie-in agreement, namely, that a tie-in did exist and that a not insubstantial amount of interstate commerce in the tied product was affected, but found that there were varying inferences which a jury might draw from the evidence concerning the third element, sufficient economic power over the tying product. It appeared clear from the Sixth Circuit Opinion to this Court and counsel for all parties that only limited issues of liability were to be retried, with plaintiff to keep its damage Judgment if liability is decided in its favor.

Retrial of the liability issues was scheduled before a jury on November 12, 1973. On that date prior to the commencement of trial plaintiff offered to waive jury trial if defendants agreed and to allow this Court to decide the issues as fact finder based on the record from the 1970 trial plus any additional evidence to be offered by either side. Defendants agreed.

Plaintiff's purpose in waiving a jury was to avoid fragmentation of the evidence, to eliminate any potential problems with instructions and to hopefully finally dispose of this protracted litigation without another time consuming and expensive trial.

This Court commends counsel for all parties for this procedure which should finally put this case to rest.

Supplemental evidence was offered by plaintiff on November 16, 1973 and by defendants on November 20, 1973.

After having again reviewed the evidence introduced at the 1970 trial and having heard and reviewed the supplemental evidence, this Court as finder of fact has concluded

that defendants did have sufficient economic power over the tying product, loans under certain terms and condition, and that the defendant, Credit Corporation, did have a competitive advantage in the credit market to enable it to impose the tie-in agreement on plaintiff and that the defendants were, therefore, in violation of the Sherman Act. My detailed findings of fact and conclusions of law follow.

FINDINGS OF FACT

1. When this case was appealed to the Sixth Circuit Court of Appeals following the June, 1970 trial, a three volume Joint Appendix was printed and filed with the Sixth Circuit. Most of the evidence relied upon by the parties is contained in those three volumes. Any evidence or other material relied upon in these Findings which appears in the three volume Joint Appendix will simply be referred to by page number in parenthesis. All pleadings, testimony or exhibits relied upon which do not appear in the three volume Joint Appendix will be otherwise appropriately identified.

2. Fortner Enterprises, Inc., plaintiff herein, is a corporation organized under the laws of the Commonwealth of Kentucky with its principal place of business in Louisville, Jefferson County, Kentucky. Its principal stockholder is A. B. Fortner, Jr.

3. The defendant, United States Steel Corporation, is generally known to be the largest manufacturer of steel in the United States and is one of our Nation's largest corporations. For some time prior to 1959, one of United States Steel Corporation's Divisions has been known as the United States Steel Homes Division [hereinafter called Homes Division], which had as its function the manufacture and assembly of component parts which comprise various models of prefabricated house packages.

4. The defendant, U. S. Steel Homes Credit Corporation [hereinafter called Credit Corporation], is a separate corporate entity owned by United States Steel Corporation and is, therefore, a subsidiary of United States Steel Corporation. The Credit Corporation was established in 1954 [Certificate of Incorporation, PX 2-E].

5. The Homes Division of United States Steel made a presentation to the Finance Committee of United States Steel at its January 12, 1954 meeting [PX 1-M; 108], which recommended that a financing corporation be established to provide construction money and to originate mortgages for resale to investors [1088, 1089]. That exhibit indicates that the proposed finance corporation ". . . will not be used as a means to force sales to dealer-builders" [1090].

6. The United States Steel Corporation's Finance Committee Minutes [PX 1-W; 1095, 1096], authorized and directed the Credit Corporation to establish a "special" financing program of land acquisition and development loans to dealers in order to enable the Homes Division ". . . to obtain a minimum distribution of 1800 units in 1959, and such additional distribution as may be feasible . . .". Those loans were to be ". . . without conformity with conventional or conservative patterns but within the bounds of prudent business judgment;" provided that the Homes Division underwrite and guarantee losses to a defined extent. Subsequent Finance Committee Minutes indicate that the program was authorized to assist in increasing sales of the Homes Division for 1960 and 1961 [1098].

7. The Court thus finds that there was a change in policy established by the defendants which resulted in Credit Corporation's loans being used as a "tool" to aid the Homes Division in making sales of prefabricated house packages.

8. The Homes Division's factory and principal office in 1960 was located in Southern Indiana just across the Ohio River from the Louisville, Jefferson County, Kentucky area. The Homes Division at that time desired to expand its sales of prefabricated house packages in the Louisville, Jefferson County, Kentucky, area. At that time, Mr. A. B. Fortner, Jr., and another gentleman owned a corporation known as Iroquois Developers which owned a subdivision in Jefferson County, Kentucky. A portion of that subdivision had already been developed and the lots had been sold to builders who had built houses upon them. The remaining portion of that subdivision had been partially developed by the construction of streets and installation of necessary utilities and the remainder of the subdivision, while platted, was still undeveloped [PX 42 and 43; 1226-1228].

9. One of Mr. Fortner's salesmen learned of the special financing program of the Credit Corporation and advised the Home Division personnel of Mr. Fortner's interest in the subdivision in Jefferson County, Kentucky. As a result, Mr. Fortner was contacted by Homes Division representatives and negotiations were commenced designed to interest Mr. Fortner in building prefabricated house packages in the subdivision [211, 212]. At that time Mr. Fortner was advised of the Credit Corporation's special financing program which could provide loans for land acquisition and development as well as the purchase and building of the houses themselves [212].

10. Credit Corporation representatives then became involved in the negotiations which resulted in their offering Mr. Fortner 100% land acquisition and development loans plus all of the money which would be required to purchase the prefabricated house packages and build them [214, 215]. The negotiations at that point had been premised upon Mr. Fortner buying out the interest of his co-stockholder in Iroquois Devlopers. However, in Mid-1960, Mr. Fortner's co-stockholder, a Mr. Robards, indicated that he would not

consent to be bought out and that he desired to attempt to undertake the development and buy out Mr. Fortner's interest. Mr. Fortner agreed to this and Mr. Robards then commenced negotiations with the Credit Corporation but could not make an arrangement with them. Mr. Robards then agreed to sell his interest to Mr. Fortner in Iroquois Developers and the negotations between Mr. Fortner and the Credit Corporation were reactivated [PX 43; 1227, 1228].

11. The Credit Corporation then reaffirmed its offer of 100% land acquisition and development loans plus all of the money Mr. Fortner would require to purchase the prefabricated house packages and build the houses. This offer was conditioned upon an agreement that there would have to be erected on each lot in the subdivision a prefabricated house package manufactured by the defendant, United States Steel Corporation [220, 221].

12. A. B. Fortner, Jr., had for quite a number of years prior to 1959 owned a real estate brokerage company in Louisville, Kentucky, known as Zetwock-Fortner Corporation which had sold thousands of residential properties in the Louisville and Jefferson County, Kentucky area [206]. Mr. Fortner, through other companies, had been involved in real estate development and had also been involved in the construction of some residential dwellings. As a result, Mr. Fortner was personally familiar with the type of land acquisition and development loans available in the Louisville and Jefferson County area, and to his knowledge, particularly, 100% land acquisition and development loans were not available from any conventional lending source of any type or any source known to Mr. Fortner in 1959 or 1960 [221].

13. The type of loan offered Mr. Fortner by the Credit Corporation was highly attractive and unique to Mr. Fortner since to his knowledge no such loans were available from other sources and for that reason he was willing to accept

at that time the requirement that he erect upon each lot in the subdivision a prefabricated house package manufactured by the Homes Division of United States Steel Corporation.

14. Mr. Fortner, prior to and during 1960, owned all but a few shares of a corporation known as the Gold Rose Gift Shop. This corporation was dormant and had a $16,000.00 deficit, and it was agreed that its name would be changed to Fortner Enterprises, Inc., and that said corporation would purchase the subdivision in question from Iroquois Developers. Mr. Fortner was not required to personally endorse or guarantee the loans to be made by Credit Corporation to Fortner Enterprises, Inc.

15. As a result of the above described negotiations, in October, 1960, notes, a mortgage and a loan agreement were executed by Fortner Enterprises in favor of the Credit Corporation [44-74]. The notes bore an interest rate of 6% and a fee or discount of ½ of 1%. The loan agreement specifically contained the requirement that Fortner Enterprises, Inc., purchase and erect on each lot in the subdivision a prefabricated house package manufactured by the Homes Division of United States Steel Corporation. The contractual obligations represented by the notes, mortgage and loan agreement were between Fortner Enterprises, Inc., and the Credit Corporation. The United States Steel Corporation was not a party to that agreement. However, that agreement did specifically contain the tie-in requirement of the purchase and erection of the prefabricated house packages of the Homes Division of the United States Steel Corporation.

16. Since it is undisputed that the tie-in provision was in the loan agreement and since the defendants have offered no additional evidence raising any question as to the existence of the tie-in provision, in accordance with the last Opinion of the Sixth Circuit in this case, this Court finds

as a matter of law that the tie-in agreement complained of by plaintiff did exist.

17. Following the execution of the notes, mortgages and loan agreement, Fortner Enterprises ordered and erected certain model homes, had a grand opening and commenced the sale of houses from the models [222-224]. Sales initially were quite good and Fortner Enterprises began building the houses sold in the first few months following the grand opening [231]. During the Summer of 1961, as Fortner Enterprises began building the homes which had been sold, an additional 32 lots became available in the subdivision which had been sold to a contractor who had become the General Superintendent for construction in the project in question. The Credit Corporation agreed to make another 100% land acquisition and development loan to add these 32 lots to the project with the loan also to meet all requirements for the purchase of the prefabricated house packages and building of the houses and this transaction was concluded in August, 1961 by the signing of a note, mortgage and loan agreement. That loan agreement also contained the tie-in provision referred to above [254-255].

18. During the June, 1970 trial of this action, plaintiff introduced substantial evidence which plaintiff claimed established that it had encountered certain problems with the Homes Division prefabricated house packages, including shortages of components upon delivery and defects in design and manufacture. Plaintiff claimed that as a result of these problems, its subdivision developed a bad reputation and lack of consumer acceptance which resulted in plaintiff's inability to sell additional houses. The evidence was introduced primarily to establish the fact of damage to the plaintiff which was resolved by the jury in the 1970 trial in favor of the plaintiff. This evidence is alluded to in these Findings only as background for the events which occurred after plaintiff began complaining to the Homes Division

about shortages and defects in design and manufacture of component parts.

19. Mr. Fortner testified that in the latter part of 1961 he contacted Mr. Richard Dyas, Vice President of the Credit Corporation, and advised him of the unsatisfactory character of the prefabricated house packages of the Homes Division and his company's inability to sell them and requested that Fortner Enterprises, Inc., be relieved of the tie-in provisions of the loan agreement in order that it might build another prefabricated house package or a conventional home. Mr. Dyas refused this request [256, 257].

Fortner Enterprises, Inc., continued to attempt to sell the Homes Division's prefabricated houses and continued to complain of the quality of those houses until June 5, 1962 when a meeting took place at the offices of counsel for the plaintiff which was attended by Mr. A. B. Fortner, Mr. Herman Miles and others representing the plaintiff and by Mr. Black and others representing the Homes Division of United States Steel Corporation and by Mr. Dyas and Mr. Rollings of the Credit Corporation. The Court finds that the witnesses for all parties agree that plaintiff's complaints concerning the prefabricated house packages were expressed at that meeting and that plaintiff sought to be relieved of the tie-in appearing in the loan agreements in order that plaintiff might build another type of prefabricated house or a conventional house in its subdivision thereby making it possible to pay off its debt to the Credit Corporation. This request was refused by Mr. Dyas of the Credit Corporation [261-263].

20. The Court finds that Fortner Enterprises' account with the Credit Corporation was current as of the June 5, 1962 meeting [PX 242; 1300, 1301], but that immediately following the June 5, 1962 meeting the Credit Corporation began the preliminary steps required to foreclose upon the

plaintiff's subdivision under the mortgage given as a part of the package [PX 126 and 127; 1247-1250; PX 132, 1258-1263]. As a result the Credit Corporation wrote the plaintiff on July 12, 1962 demanding payment of all outstanding obligations [PX 3; 75].

21. Shortly after the July 12, 1962 letter on July 19, 1962, this antitrust action was filed by plaintiff against both defendants [38-76].

22. The second required element of an illegal tie-in agreement violative of the Sherman Act is that a not insubstantial amount of interstate commerce in the tied product be restrained. Plaintiff's evidence established that under the two loan agreements entered into with the Credit Corporation plaintiff was required to purchase 210 prefabricated house packages. The least expensive house package which plaintiff was purchasing cost plaintiff approximately $3,150.00 [637]. This amounts to a total of $689,850.00 worth of house packages which plaintiff was obligated to purchase under the terms of the loan agreement and under the requirements of the tie-in contained therein. In addition, the undisputed evidence from the defendant's own records established that with insignificant exceptions, all loans made by the Credit Corporation contained the tie-in agreement [742-744] resulting in millions of dollars of sales of house packages by the Homes Division in 1960, 1961 and 1962 [1199]. Thus, the undisputed evidence established that substantial amounts of interstate commerce in the tied product, the prefabricated house packages, were restrained by the tie-in agreement, or agreements, complained of whether plaintiff's own purchases or commitments to purchase are viewed by themselves or whether they are viewed as a part of the larger volume of sales connected with Credit Corporation's entire lending program. Since no new evidence was introduced by defendants concerning this element

of the case, in accordance with the Supreme Court's Opinion in this action and the last Opinion of the Sixth Circuit in this action, this Court finds as a matter of law that plaintiff has met its burden concerning this element and that as a matter of law a not insubstantial amount of interstate commerce in the tied product was restrained.

23. The third required element for the establishment of an illegal tie-in agreement violative of the Sherman Act involves the Credit Corporation's economic power over the tying product, in this case, loans under certain terms and conditions to appreciably restrain trade in the tied product. As previously indicated, this Court finds that the Credit Corporation did have sufficient economic power over the tying product or element and the evidence which leads the Court to this conclusion is set forth in the following series of Findings.

24. William H. Lang was President of the defendant, Credit Corporation, during all times pertinent to this litigation [895]. Portions of Mr. Lang's deposition were read into evidence by plaintiff. Mr. Lang testified that when a dealer, such as Fortner Enterprises, was not able to finance through local or normal channels, the Homes Division of the defendant, United States Steel Corporation, would call in the Credit Corporation to meet the dealers' financing problems [896]. Mr. Lang went on to testify that the Credit Corporation consistently aided the Homes Division sales program through aid given to dealers [897], and he went on to testify that the Credit Corporation had made loans at the insistence of the Homes Division when the Credit Corporation did not consider the loans to be a good financial risk when regular banking and financial principles were applied [897, 898]. Mr. Lang at the trial of this action itself testified that at the direction of defendant, United States Steel Corporation, the Credit Corporation instituted

in 1958 its special financing program concerning land acquisition and development to help the Homes Division increase its sales of house packages, that the loans made at the request of the Homes Division under the special financing program were to be guaranteed by the Homes Division including specifically the Fortner Enterprise's loans [972-975]. Plaintiff's Exhibit 237 [1258], is the Underwriting Agreement in which the Homes Division guaranteed the land acquisition and development portions of the Fortner loans as well as loans made to a number of other dealers under the special financing program. This Court thus finds that the defendants' own witness has testified that the loans made under the Credit Corporation's special financing program were a special type of loan not available from normal or conventional sources.

25. The Underwriting Agreement [Plaintiff's Exhibit 237, 1268], lists forty-three [43] separate loans which were classified as the high risk type loans for which the Credit Corporation wanted to be protected by the Homes Division [981]. These were all land acquisition and development loans [980].

26. Turning specifically to the loans made to Fortner Enterprises, Inc., for land acquisition and development, the evidence was undisputed that those loans made by Credit Corporation to Fortner Enterprises, Inc., amounted to 100% of Fortner Enterprises' cost to acquire the land in question and to develop it, including the installation of streets and all utilities to the point that the lots were ready to have houses built on them. This was the portion of the loan which the defendant, United States Steel Corporation, guaranteed to the Credit Corporation. The evidence also established that the construction portion of the loans from Credit Corporation to Fortner Enterprises amounted to all of the funds which Fortner Enterprises required under normal circumstances to build houses on the lots. The construction loan, of course, did not cover costs incurred by Fortner Enterprises at the closing of a sale to a purchaser, nor did they include Fortner Enterprises' profit.

27. The Court finds from Mr. Fortner's testimony that 100% land acquisition and development loans were quite unique to Mr. Fortner as President of the plaintiff corporation. Mr. Fortner had been associated with the real estate business in many capacities for quite a number of years before the transactions in question. He had been involved himself in the development of subdivisions and in obtaining financing for such development, as well as in assisting in obtaining financing for customers or clients. Mr. Fortner was familiar with the types of land acquisition and development loans available in the Louisville area and he has testified that no such loans, to his knowledge, were available from any other source, particularly when the other significant terms of the loans were considered. Those terms were 6% interest plus ½ of 1% discount fee, along with no requirement of a personal guarantee by himself as President of the corporation or by any other officer of the corporation.

28. Mr. Fortner's testimony and other substantial evidence and testimony which were not contradicted by defendants have convinced this Court that the loans in question were unique. This Court has taken judicial notice that Federal statutes or regulations prohibit Federally insured banks and savings and loan associations from making 100% land acquisition and development loans. Mr. Edwin Horn, President of Louisville Mortgage Service Company, testified in this action. Louisville Mortgage Service Company at the time in question and for many years prior thereto has been in the business in Louisville, Kentucky, of making loans for commercial investors, including commercial banks

and insurance companies. None of Mr. Horn's customers were making 100% land acquisition and development loans on the terms given to Fortner Enterprises or any terms during this period of time and such loans to Mr. Horn's knowledge were not available in this area during that time.

29. Mr. Charles Henne of Prudential Life Insurance Company testified that as a matter of policy Prudential Life Insurance Company was not making any land and acquisition development loans during the period of time in question, much less 100% land acquisition and development loans.

30. Mr. Paul F. Semonin is one of the best known realtors and real estate developers in the Louisville and Jefferson County area. Mr. Semonin has been associated with the real estate business in this area for about 35 years [868]. During the period 1969 through 1961, Mr. Semonin was familiar with the type of financing available to developers and builders and his testimony was that there were not any 100% land acquisition and development loans available from normal or conventional sources during that period of time [868-869].

31. Plaintiff, as a part of its supplemental evidence presented on November 16, 1973, called Mr. Ralph Logan, President of Southern Savings & Loan Association, a Louisville, Kentucky state chartered savings and loan [November, 1973, Transcript, p. 139]. Southern Savings & Loan did not make any land acquisition and development loans during the pertinent period of 1959-1961 [p. 142]. The largest loan which Southern Savings has ever made has been somewhere between Two Hundred and Two Hundred and Fifty Thousand Dollars [p. 143]. Mr. Logan testified that Southern Savings would not have made a land acquisition and development loan of the character which the Credit Corporation made to Fortner Enterprises whether

or not Fortner Enterprises had a deficit at its beginning [pp. 143, 144]. Mr. Logan, as President of Southern Savings during 1959 through 1961, kept abreast of market conditions in the Louisville area and the types of loans that were available and he was unaware of any building and loan associations that would have made a 100% land acquisition loan during that period and he didn't know of any body making such loans during that period [p. 145]. In his opinion a 100% land acquisition and development loan is not a prudent loan due to the risk factor [p. 146].

32. Mr. Charles Will, President of Portland Federal Savings & Loan Association, was also called as a witness as a part of plaintiff's supplemental proof given in November, 1973 [p. 157]. Mr. Will testified that the Federal regulations applicable to Federally insured savings and loan associations in 1959 limited loans for land acquisition and development to 60% of the value of the raw land and 60% of the development cost [p. 158]. Mr. Will testified that his company could not under the regulations make a 100% land acquisition and development loan [p. 159], and even if they were not restricted by such regulations they would not make such a loan [p. 160]. Mr. Will pointed out that a 100% loan of that nature is not a conservative loan and amounts to the lender buying the property [p. 160]. Mr. Will, as President of Portland Federal, kept abreast of market conditions and the types of loans made during the 1959-1961 period and to his knowledge no normal or conventional lending source was making 100% land acquisition and development loans during that period [pp. 162, 163]. Portland Federal did begin making some land acquisition and development loans at the 60% level in 1961 or 1966 and it is significant to this Court that the interest rate was 6% and the terms of the loans were generally for two years along with service fees which ranged up to 5% [pp. 160-

162]. The Court thus finds that Portland Federal was able to obtain the same interest rate which the Credit Corporation obtained for a loan made for the same period of time, two years, as the Credit Corporation loan to the plaintiff and that Portland Federal was able to obtain a higher service fee for the loan even though the loan in relation to raw land value and development cost was 60% instead of the 100% loan which the Credit Corporation made. Clearly the land acquisition and development loan made by the Credit Corporation to Fortner Enterprises was more advantageous to Fortner Enterprises than the type of land acquisition and development loan which Portland Federal was making. Fortner Enterprises was able to obtain 40% more money at less cost than it theoretically could have obtained from Portland Federal.

33. The defendants called as their witness, Mr. Innes Dobbins, President of Liberty National Bank & Trust Company, as of the time of his testimony, in 1970 [415]. Dr. Dobbins testified as to the study made under his supervision of excess funds theoretically available for lending through banks, savings and loan associations and insurance companies in the Louisville area during the years 1959 through 1962, but there is no evidence in the record that such funds were available for 100% land acquisition and development loans under the terms given the plaintiff in this case. Mr. Dobbins also testified that it was his understanding that during the pertinent period of 1959 through 1961 Prudential Insurance Company and Louisville Mortgage Service Company were making 100% land and acquisition development loans in this area [420, 421]. However, the Court recognizes that Mr. Horn of Louisville Mortgage Service Company and Mr. Henne of Pudential Life Insurance Company have both testified that their companies were not making such loans during that period, as set forth

previously in these Findings. Mr. Dobbins also testified as to a comparison between the rate of earnings of the Credit Corporation and two Louisville Savings Associations of which he had knowledge and found the Credit Corporation's earnings comparable to the Savings and Loan Associations. This Court does not find this comparison to be of great evidentiary significance since it merely indicates that the Credit Corporation was able to make a profit comparable to that of the two Savings and Loan Associations with which its profits were compared in spite of the high risk type loans made under the special financing program. Since the special financing program loans of the Credit Corporation were guaranteed or underwritten by United States Steel Corporation, the Credit Corporation would certainly not be expected to show a loss at least as a result of those loans since any such loss would have been covered by United States Steel Corporation. This comparison merely confirms that the Credit Coporation's interest rate and discount or service fee were comparable to those charged by Savings and Loan Associations.

34. Stanley Mack was called by the plaintiff as a witness at the trial of this action in 1970 [438]. At the time of that trial Mr. Mack was employed by the defendant, Credit Corporation. Prior to that time he had been employed by the Homes Division of the defendant, United States Steel Corporation [439]. During the 1959 through 1961 period, Mr. Mack was the Manager of Sales Division and his job included sales training programs and seminars [439]. Mr. Mack identified Plaintiff's Exhibit 7 as a portion of the Homes Division's Sales Manual and it was duly offered into evidence [441]. Mr. Mack further identified the land acquisition and development portion of that Sales Manual as having been part of a refresher seminar given to the Homes Division personnel after consultation with

the Credit Corporation [442-445]. Plaintiff's Exhibit 240 [1279], is a portion of the Sales Manual which is Plaintiff's Exhibit 7. Exhibit 240 was attached to Plaintiff's Exhibit 238 [1275], which is a letter from the head of the Homes Division, D. H. Boyd, to the Assistant General Solicitor of United States Steel Corporation dated August 1, 1962 and referring to this litigation. That letter states in part:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department, in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotiations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the arrangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category." [1275, 1276].

It is clear from reading the Sales Manual of the Homes Division and the Credit Corporation's Minutes and other documents placed in evidence by plaintiff which were obtained from the defendants that the Credit Corporation's primary function was to make loans at whatever terms were required to obtain sales of prefabricated house packages for the Homes Division. In referring to land acquisition and development loans, the Sales Manual states:

> "When asked, 'What's your land development deal?', you can almost answer with the question, 'How high is up?'." [1287].

The Sales Manual concerning land acquisition and development loans goes on to point out that ". . . Most of the other major manufacturers make development loans in some form or another, but most of them charge a fee of 10% or more in addition to simple interest. We only charge a ½ point fee." [1291].

Finally, that Sales Manual sums up the way in which the Credit Corporation was used as follows:

> "There have been a good number of special loans made in the past three years, each one a little different, but each one with some merit. Conversely, in some cases the Credit Corporation turned down what seemed to be a good real estate loan, but didn't look as though it would produce home shipments. I know of one case where there was a choice piece of ground, in an excellent location, supported by a strong market. The requested loan was to be guaranteed by a multi-million dollar corporation. From a pure real estate investment standpoint, it was excellent. However, we chose not to recommend the loan to the Credit Corporation because we couldn't see a full time qualified general manager or anyone in the organization with the ability

or the time to merchandise our homes. In other words, I just didn't see how we would get very many houses shipped. Sure, the loan was secure, and the Credit Corporation would be paid back, but we wouldn't accomplish our only purpose in making the loan and that is shipping houses. That's why the Credit Corporation exists and that should be our first consideration before requesting financing assistance." [1296].

Concerning the leverage which the special financing program conferred to the Homes Division through the Credit Corporation, the Sales Manual states:

"Does this approach sound a little rough on the dealer? I don't think so. Remember, he helped to determine a conservative one year program of development, in this case 40 lots. But the loan is paid back in only 22 lots. All you're asking him to do is produce in two years what he said could be done in less than one. Do you see the lever that this gives you? He is more likely to push hard to sell our houses when there is a penalty if he doesn't. People like to take the line of least resistance. Before this clause was put in, a program could be opened, and start slowly. It was easy to say, 'It's obviously the product, we'll go back to conventional or something else.' Now a program is opened, sales start slowly and the thinking is, 'Let's bring in a new model,' or 'Let's improve on our advertising.' I think it gives us an excellent sales tool. It is not necessary for you to try to explain this to your dealer or prospect. It can be a matter of negotiation between the dealer and the Credit Corporation. I just wanted you to be aware of it." [1292].

35. Certain actions of the defendants confirm the application of the special financing program as described in

the Sales Manual. In March, 1960, for example, while the negotiations were taking place which resulted in the October, 1960 agreements, the Credit Corporation was asking for assurances from the Homes Division that if Fortner Enterprises failed, the Homes Division would put the property in production or get another dealer to take over the project [PX C-21; 1134, 1135; PX 55, 1232, 1233].

Even earlier in January, 1960, a memorandum from Lang to Dyas [PX C-23, 1313] states:

"With regard to (b) above, we should know, if possible, or at least have confidence that the dealer can make a satisfactory profit from the use of our product. With all of our money out front, he has very little incentive to finish off a project. If his profits are not adequate or are not comparable to his prior experience, then we probably do not have a good loan. In making this statement, it is not the financial risk aspects which are referred to, but rather the fact that the loan will not produce house sales. The worst thing that can happen—and perhaps we have it at Broyhill—is an unsuccessful development. This precludes, in most cases, any other house sales in that area, because the one we have there has been unsuccessful."

Thus, the Court finds that the Credit Corporation was not so much concerned with the risks involved in loans but whether they would help sell houses.

36. Plaintiff propounded to defendant, Credit Corporation, Requests for Admissions which were introduced in their entirety as Plaintiff's Exhibit 2. In response to Request for Admission 19, the Credit Corporation admitted "that the estimated percentages of total shipments of house packages by the Homes Division which were made to dealers receiving financial assistance from the Credit Corporation

for the years 1960, 1961 and 1962 are as follows: 1960, 68%; 1961, 70%; 1962, 75%."

The Credit Corporation in response to Request for Admissions 20, admitted that loan commitments for 1960 of the Credit Corporation totalled $22,625,805.00, for 1961 totalled $19,342,612.00 and for 1962 totalled $19,283,544.00.

The Credit Corporation in response to Request for Admissions 21, admitted that all loan commitments entered into in 1960, 1961 and 1962 contained the tie-in provision which is the subject matter of this suit, with relatively insignificant exceptions totalling $627,000.00 [742-744].

37. Land financing loans [land acquisition and development loans] outstanding at the end of 1960 amounted to $5,372,000.00 [1353], while house package sales of the Homes Division for that same year amounted to $6,747,353.00 [1199]. Land financing loans outstanding at the end of 1961 amounted to $5,918,000.00 [1353], while house package sales of the Homes Division were $5,051,992.00 for that same year [1199].

38. An analysis of the loans dated prior to the end of the calendar year 1961 listed in the attachment to the Underwriting Agreement in which the defendant, United States Steel Corporation, guaranteed certain identified land acquisition and development loans which qualified under the special financing program including those made to the plaintiff amounted to $7,738,000.00 [1273, 1274], which figure was substantially in excess of the slightly over Five Million Dollars worth of house package sales made during the year 1961.

39. The evidence established that the Credit Corporation was funded by its parent corporation, United States Steel Corporation, partially by the purchase of stock, partially by loans from United States Steel to the Credit Corporation at an interest rate of one point above the applicable prime rate and partially through the Credit Corporation's borrowings from banks at the prime rate using the credit standing of United States Steel.

While United States Steel Corporation had elected to allow the Credit Corporation to obtain the bulk of the Credit Corporation's funds through borrowings from banks at the prime rate based on United State Steel's credit standing, the record also establishes that in July, 1961, United States Steel had agreed to purchase, upon request of the Credit Corporation, an additional Nine Million Dollars' worth of stock and further had agreed to advance an additional Twenty-nine Million Dollars which would have been subordinated to the bank loans [1101, 1102].

40. The Credit Corporation's financial statements [1349-1355], indicate that it paid no dividends to United States Steel and that it had full use of its accumulated income.

41. The annual report of the defendant, United States Steel Corporation, for 1961 was introduced into evidence [1185]. This report also contained the figures for 1960. That report indicates that United States Steel Corporation had net income after taxes in 1960 of $304,200,000.00 and in 1961, of $190,200,000.00. It had cash and securities of $451,700,000.00 in 1960, and of $642,200,000.00 in 1961, and it had total assets, less current liabilities in excess of 3.8 Billion Dollars in 1960 and in excess of 4.3 Billion Dollars in 1961.

42. An analysis of the Credit Corporation's income statements for 1960 and 1961 [1355], indicates that the bulk of the Credit Corporation's expenses represent interest on loans payable. Obviously the United States Steel Corporation elected to use its credit standing with banks to allow the Credit Corporation to obtain the bulk of its capital from banks at the prime rate instead of United States Steel

Corporation simply injecting the necessary capital into the Credit Corporation through the purchase of stock which would not have cost the Credit Corporation anything for its use in terms of paying interest therefor.

43. Plaintiff called as a witness at the 1970 trial Mr. Herman Miles. Mr. Miles and his company were the supervisors of the construction at the plaintiff's project in question. Mr. Miles had had experience in house building and was president of a local lumber company. Mr. Miles had had vast experience in computing the cost of building houses. Mr. Miles testified as to a comparison which he had made of the prefabricated house package of the Homes Division with the cost of materials and assembly of a conventional house comparable to the Homes Division house package and found that the United States Steel house package was priced $455.00 more than the comparable components at the same point in a conventional home [637].

44. Plaintiff called as an expert witness Dr. John Masten on November 16, 1973 at the time plaintiff's supplemental evidence was presented. Reference to Dr. Masten's testimony in these Findings will, therefore, be to the Transcript of Evidence of the November, 1973 testimony.

Dr. John Masten has Bachelor and Master's Degrees from the University of Illinois and a Ph.D from the University of North Carolina. A rather extended summary of his background and qualifications and publications was filed without objection as Plaintiff's Exhibit 500.

Dr. Masten was a Professor at the University of Kentucky from 1948 to 1967. During the approximate five year period prior to his leaving the University of Kentucky in 1967, Dr. Masten had been the head of the Department of Economics and the Director of Graduate Study in Economics at the University of Kentucky (p. 22). Dr. Masten left

the University of Kentucky in 1967 to go to the University of Georgia where he teaches courses in Commercial Banking at the undergraduate level and courses in Money and Capital at the graduate level [p. 21].

During Dr. Masten's 19 years at the University of Kentucky the principal area of his teaching responsibility had been devoted to the financial or banking field and he had been active in and the Director of the program sponsored by the State Department of Banking, the University of Kentucky and the Kentucky Bankers Association which operated the annual program of the Kentucky School of Bankers and he had continued to maintain that connection with the Kentucky School of Banking since his tenure at the University of Georgia [pp. 22, 23].

Dr. Masten, since he has been at the University of Georgia, has been the Program Director also of the Georgia Banking School. Both schools have a program that covers various areas of banking, including investments, management of bank funds, manpower utilization and most importantly, lending. In this connection, Dr. Masten constantly collects and reviews loan cases [pp. 23-26].

Dr. Masten has devoted a good deal of his time during the past 25 years to the collection of loan cases and study of them in Kentucky [p. 26]. As a result of his work as an Economics and Banking Specialist at the University of Kentucky and his work in banking, and particularly the lending aspects of banking in conjunction with the Kentucky Bankers Association, Dr. Masten has a general knowledge of the principles that bank and non-bank lenders would follow in making land acquisition and development loans in Kentucky, including the Louisville and Jefferson County area for the period 1959, 1960 and 1961 [p. 30].

The Court finds that Dr. Masten was highly qualified to testify in the lending and economic areas involved in this

litigation and Dr. Masten's qualifications were certainly not questioned by counsel for the defendants. Dr. Masten's particular background in Kentucky, including the period of time involved in this lawsuit, especially qualify him to testify about lending policies and practices in the Kentucky area.

Dr. Masten first pointed out that all loans are not the same and that there are risk differentials that make each loan almost separate in its own characteristics [p. 27]. Assuming that all terms and conditions are the same, Dr. Masten pointed out that the larger the percentage of a land acquisition and development loan to cost of the land acquisition and development, the higher the risk of the loan becomes to the lender [p. 28].

He pointed out that a lender would want to be protected by some type of guarantee, whether it be in the context of the amount of the loan relative to the value of the property or a guarantee by some third party [p. 28]. In other words, normally a lender will lend a borrower money if the borrower could prove that he really doesn't need it [p. 28].

It was brought out that Dr. Masten, in preparing for his testimony, had quite properly reviewed various key exhibits in this case including the Loan Agreement in question [Plaintiff's Exhibit 5], the Underwriting Agreement [Plaintiff's Exhibit 237], the Financial Statement of the defendant, United States Steel Corporation covering 1960-1961 [Plaintiff's Exhibit 31], and the 1961 and 1962 Financial Statements of the Credit Corporation [Attachments to Plaintiff's Exhibit 2].

In response to a hypothetical question which included the basic pertinent facts introduced into evidence in this litigation, such as the undisputed fact that the loans for land acquisition and development from the Credit Corporation to Fortner Enterprises represented 100% of the cost

of land acquisition and development thereof, and that as of the time of the first such loan, Fortner Enterprises had a deficit of approximately $16,000.00, and that no personal guarantees were required of any officer of Fortner Enterprises, Dr. Masten testified that a loan such as was made to Fortner Enterprises would not have been available from normal channels of credit. He pointed out that this was a very unique kind of loan and that it was not the kind of loan you would normally find in the housing credit market at that time [pp. 31, 32].

Dr. Masten pointed out that this loan was unique in and of itself because it represented 100% of the cost of land acquisition and development particularly for the period of time in question. Such a loan is of such a high risk nature so that a prudent lender would have been unwilling to have made a loan involving 100% risk [p. 32].

Dr. Masten pointed out that the period of time in question, namely, 1959, 1960 and 1961, was a period of economic stability and not a period of inflation and that there was a definite risk inherent in a 100% loan under such conditions of economic and price stability [pp. 32, 33]. He referred in support of his testimony that this was a period of economic stability to the wholesale price index.

One of the other unique characteristics of this loan as brought out by Dr. Masten was that the loan was guaranteed, not by an affiliate of the borrower but by an affiliate of the lender, namely: United States Steel Corporation [p. 33]. Dr. Masten went on to point out how highly unusual it is for a company connected with the lender to guarantee the loan to the lender. The normal situation is for a company or person connected with or associated with the borrower to guarantee the loan to the lender [pp. 35, 36].

Dr. Masten also pointed out that the tie-in provisions of the loan themselves made the loan unique and at the same time required the borrower to buy houses from the Homes Division as a condition of getting this unique type of loan [p. 33].

Dr. Masten pointed out that the rate of interest charged on these loans was 6% with a ½% fee. He pointed out that the prime rate at that time when all cost factors were considered would have run 5 to 5½% and that the loan to Fortner Enterprises was above the prime rate but still low considering the risk involved in making the loan and that it would have been virtually imposible for Fortner Enterprises to have obtained a loan at that level of interest and fee from any other source [pp. 34, 35].

Dr. Masten pointed out that which had been previously established in the record, which was, that banks generally were prohibited by law from making 100% land acquisition and development loans as well as Federally insured savings and loan associations and that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to the risk involved [p. 37].

It was Dr. Masten's Opinion that the Credit Corporation had economic power by granting terms to the borrower that were so distinctly unique that it was almost inconceivable that the funds could have been acquired from any other source [p. 38].

Dr. Masten pointed out that there are really segments of the credit market and it is not one over-all market. He pointed out that in his opinion 100% land acquisition and development loans of the nature and terms granted to the plaintiff were a segment of the credit market [p. 39], and that if you only have one lender making such loans within that segment of the market, then that lender has economic power within that segment [p. 39].

Finally, Dr. Masten testified that in his opinion, based on his analysis of the situation, including the nature of the loans made by the Credit Corporation and the Credit Corporation's relationship with United States Steel Corporation that the Credit Corporation had definite leverage in the segment of the credit market related to land acquisition and development loans as a lender because of the uniqueness of the terms of the loans made and that this leverage was exercised [pp. 47, 48].

45. Defendants called an expert witness, Mr. Karl Gustav Pearson, who was a Professor of Business Administration at the University of Michigan with a Bachelor of Arts degree, and he also was an Attorney [906]. Mr. Pearson had concentrated his work in the general real estate field but the record does not show that he had concentrated in financing or land acquisition and development loans.

Mr. Pearson expressed an opinion that 100% land acquisition and development loans were available in the Louisville area in 1959, 1960 and 1961 [912]. This opinion was based on a survey which Mr. Pearson allegedly made in Louisville in 1970 within six months prior to the June, 1970 trial. Mr. Pearson did not identify the persons or organizations which he surveyed in Louisville. Mr. Pearson believed that 100% land acquisition and development loans were available from savings and loan associations, real estate syndicates, joint ventures, suppliers of materials that went into construction, sub-contractors and individuals.

The Court finds that Mr. Pearson's testimony is against the great weight of the evidence introduced at the trial of this action and that it was without sufficient foundation to be given substantial weight by this Court.

~~Defendants listed as potential witnesses at the trial scheduled for November, 1973, two additional expert witnesses, Professor Thomas Gies and Professor Randolph~~

~~McGhee, and counsel for defendants requested and received leave of Court to allow Professor McGhee to sit with counsel for defendants and consult with them during the testimony of the plaintiff's expert, Dr. John Masten, given on November 12, 1973.~~ However, ~~neither of those experts was called by counsel for defendants as a witness as a part of defendants' supplemental evidence in November, 1973. The Court feels that a reasonable inference to be drawn from the defendants' failure to call their experts is that those experts would not have substantially contradicted or disagreed with the testimony of the plaintiff's expert, Dr. John Masten.~~ deleted JFG 8-9-74

46. The Court has reviewed the cross-examination of Dr. Masten by counsel for defendants. ~~As indicated above, counsel for defendants did not question the expertise of Dr. Masten.~~ JFG The Court does not find that the cross-examination of Dr. Masten concerning the substance of his testimony materially altered or weakened that testimony as has been outlined in the previous Finding. Actually, on cross-examination, Dr. Masten really put this economic power aspect of this case in context when he pointed out at page 130 of the transcript that a 70% borrower has 30% of his own equity involved and has much more freedom in terms of his choice of lender. Such a borrower does not have to enter into any kind of an agreement which ties him to a certain product.

CONCLUSIONS OF LAW

1. The basic principles on which this case must be decided are set forth in the Supreme Court's Opinion in this case in Fortner Enterprises v. United States Steel Corporation, 394 U. S. 495 and United States Steel Corporation v. Fortner Enterprises, Inc., 452 F. 2d 1095 (6th Cir. 1971). The Sixth Circuit held that there were questions of fact

to be decided concerning the so-called "economic power" aspects of the liability issues of this case. We are guided in particular by footnote 4 appearing at the end of the Sixth Circuit's Decision. The Sixth Circuit points out that if no additional evidence is introduced then there was a tie-in and a not insubstantial amount of interstate commerce in the tied product was affected. No additional evidence has been introduced as to these points and the Court thus finds as a matter of law that there was a tie-in and that the requirements as to the amount of commerce in the tied product have been met.

The Sixth Circuit established as a broad guide for the finder of fact on the economic power issue ". . . whether the Credit Corporation . . . had 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . .'". The issue was defined elsewhere in the Sixth Circuit's Opinion as being whether the Credit Corporation possesed leverage in the credit market sufficient to induce buyers in the market for prefabricated houses to accept a less competitive product. This leverage did not have to constitute monopoly power or market dominance.

The Sixth Circuit makes it clear that this Court as finder of fact must evaluate all of the evidence and reasonable inferences to be drawn therefrom in determining the economic power question.

2. This Court concludes under the guidelines established by the Supreme Court and the Sixth Circuit for this case that the Credit Corporation did have sufficient economic power or leverage to induce buyers, including Fortner Enterprises, to enter into the tie-in arrangement which required them to buy prefabricated house packages from the United States Steel Corporation. This Court finds that the purpose of the special financing program

concerning land acquisition and development loans of the Credit Corporation was to be a "tool" to obtain sales of house packages. When United States Steel Corporation established the Credit Corporation it could have used some of its available cash to completely capitalize the Credit Corporation which would have placed the Credit Corporation's cost of money at a non-existent or very low level. Instead of electing this course of action, the United States Steel Corporation purchased a certain amount of stock in the Credit Corporation and allowed the Credit Corporation to use United States Steel's credit standing to borrow money from banks at the prime rate. The special loan program was instituted by the Credit Corporation at the authorization of the Finance Committee of United States Steel Corporation to enable the Homes Division of United States Steel Corporation to sell prefabricated houses. The loans to be made under that program were loans for land acquisition and development to borrowers who could not obtain such funds from conventional sources and these loans were guaranteed by United States Steel Corporation. Since the primary purpose and objective of the Credit Corporation was to assist the Homes Division in making house package sales, the Credit Corporation clearly was not expected to maximize profits and as a matter of fact from its own financial records clearly elected to charge interest rates and fees commensurate with much lower risk loans than the Credit Corporation itself was making.

3. The Court finds that the Credit Corporation did have leverage in the credit market, or a segment thereof. The evidence established in this case that the land acquisition and dvelopment loans made by the Credit Corporation to the plaintiff with the tie-in involved were loans amounting to 100% of the cost of acquisition of land and development of the land at an interest rate of 6% with one-half of

1% fee for a two year term. The interest rate, fee and period of the loan were comparable to loans made by conventional lending institutions for land acquisition and development but no other conventional lending institution during the period of time in question was making 100% land acquisition and development loans while the Credit Corporation was. Many organizations, such as Federally insured banks and savings and loan associations, were prohibited by law or regulation from making such high percentage of loan to value loans. The other conventional lenders in the market at the time were not making such high percentage of loan to value loans because of the great risk involved. When the Credit Corporation elected to make such loans it set itself apart from other conventional lenders because it was in effect willing to take higher risks because it had a purpose or motive which other conventional lenders did not have, namely: to enable its parent, United States Steel Corporation, to sell prefabricated house packages. While some conventional lenders might be willing to take higher risks than others, the evidence is that during the period of time in question in this lawsuit no conventional lenders were willing to take the degree of risk which Credit Corporation was voluntarily and deliberately willing to take for its purposes. This was particularly true insofar as Fortner Enterprises was concerned.

Millions of dollars of loans were made under the special financing category as identified in the Underwriting Agreement filed in this case. All of those loans contained the tie-in provisions. The Credit Corporation thus utilized very effectively the special financing program to enable the Homes Division of United States Steel Corporation to sell millions of dollars of prefabricated houses. This is one of the elements of evidence establishing the economic power or leverage of the Credit Corporation. The fact that the

Homes Division was able to obtain a higher price for its prefabricated package in the same condition of a conventional house is again evidence of the Credit Corporation's leverage, or economic power. While the defendants argue that the Homes Division had a loss during the period in question, the Court does not really find this significant since the Homes Division's loss might well have been greater if the loan program which apparently was its prime method of obtaining sales had not ben utilized. Further, the Court does not feel that you can separate the Homes Division from United States Steel as a whole.

4. The Court finds that the only purpose of the Credit Corporatiton in making loans, particularly under the special financing category, was to increase the sales of prefabricated house packages by United States Steel Corporation. This is not the type of business justification contemplated by the decided cases, including the Supreme Court's Opinion in this case. The Court does not find any evidence in this record to justify the arrangement attacked by the plaintiff.

5. The undisputed evidence established that the special financing program of the Credit Corporation was authorized by the Finance Committee of United States Steel Corporation. Loans were made by the Credit Corporation under that program under the direction of personnel of Homes Division. The United States Steel Corporation and the personnel of the Homes Division used the Credit Corporation's loans as a sales "tool".

6. The Court thus finds that all of the required elements of an illegal tie-in agreement did exist since the tie-in itself was present, a not insubstantial amount of interstate commerce in the tied product was restrained and the Credit Corporation did possess sufficient economic power or leverage to effect such restraint. The Court also finds that United States Steel Corporation and the Credit

Corporation as separate corporate entities did combine or conspire to institute or put into effect this illegal tie-in agreement and that both defendants are responsible and liable therefor.

7. Since this Court has found a per se violation of Section 1 of the Sherman Act by the defendants pertaining to the illegal tie-in agreement, as described above, it is actually not necessary for this Court to decide whether the plaintiff has established a conspiracy to monopolize violative of Section 2 of the Sherman Act. However, since there may be an appeal of this action, the Court in the alternative does find that all of the elements of a conspiracy to monopolize do exist in this record. First, the Court finds that the defendants did combine or conspire to increase sales of prefabricated house packages by United States Steel Corporation by the making of loans to numerous builders containing the tie-in provision. The making of the loans containing the tie-in provision were overt acts in and of themselves in furtherance of the combination or conspiracy. In the context of this particular suit, the Court also finds that the defendants combined or conspired to threaten to enforce or enforce the tie-in provisions of the loan agreement by threatening foreclosure on Fortner Enterprises' property and taking certain steps to commence the foreclosure procedure. The Court finds that the millions of dollars of loans made under the special financing program affecting millions of dollars of sales of prefabricated house packages clearly affected a substantial amount of interstate commerce in both the loans themselves and the prefabricated house packages. Finally, the Court finds that the sole purpsoe of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages and that the implementation of the program constitutes the necessary evidence of

intent to monopolize required. Thus, the evidence described in the Findings of Fact set forth above establishes an illegal conspiracy to monopolize in violation of Section 2 of the Sherman Act.

8. Having found the defendants to be guilty of the per se violation of Section 1 of the Sherman Act and the Sixth Circuit having directed that only the issue of liability be re-tried since a jury has already decided the amount of plaintiff's damage and since a Judgment has already been entered for said damages trebled plus attorneys' fees and costs and said claim having been, therefore, previously established as to amount and thereby liquidated, a Judgment will be entered in this action for the total amount of that previous Judgment of $427,016.75 bearing interest at the rate of 6% per annum from September 18, 1970, until paid. Having found for the plaintiff in this action and the Sixth Circuit Court of Appeals having held that costs should be taxed against the defendants as a result of the last appeal to the Sixth Circuit, the Judgment to be entered will also contain an additional award of attorneys' fees and costs to the plaintiff in this action. Counsel for the plaintiff shall prepare and file the necessary Motion for award of attorneys' fees and costs with supporting Affidavits within twenty days of the entry of these Findings and counsel for defendants shall have twenty days thereafter in which to respond.

/s/ James F. Gordon
James F. Gordon
United States District Judge

Copies to:
Mr. Kenneth L. Anderson
Mr. A. Scott Hamilton
Mr. Albert F. Reutlinger

JOINT AFFIDAVIT

Kenneth L. Anderson, Woodward, Hobson & Fulton, 1805 Kentucky Home Life Building, Louisville, Kentucky, 40202, and A. Scott Hamilton, Jr., Hamilton, Rogers & Vish, 100 E. Liberty Street, Louisville, Kentucky, 40202, Counsel for Plaintiff, Fortner Enterprises, Inc., for their Joint Affidavit in support of the Motion for Award of Supplemental Attorneys' Fees for the plaintiff herein, state:

Affiants incorporate by reference their previous Joint Affidavit filed on September 15, 1970. Affiants state that the time itemized in that Affidavit ran through the trial of the within action which was concluded on June 30, 1970.

Affiants state that following the return of the jury's Verdict on June 30, 1970, affiants had to prepare for and argue against defendants' Motions for Judgment Notwithstanding the Verdict and for a New Trial. Thereafter, affiants had to review those portions of the record selected by counsel for defendants for inclusion in the printed Appendix and then had to review the remainder of the trial record and exhibits to determine those additional items of evidence and pleadings which should be included in the printed Appendix. Affiants then had to prepare and file a Brief for the Sixth Circuit Court of Appeals and argue the case orally before the Sixth Circuit.

Affiants then had to prepare and file with the Supreme Court of the United States a Response to the Petition for Writ of Certiorari filed on behalf of defendants.

Affiants then had to prepare the case for retrial of the liability issues and said retrial was commenced on March 14, 1973, and on the following day a mistrial was declared on Motion of counsel for defendants on the ground of unfavorable publicity appearing in the local newspapers.

Affiants then had to prepare the case for trial again for its rescheduled date in November, 1973, and to then

prepare Briefs and tendered Findings of Fact and Conclusions of Law after it was agreed that this Court could decide the case as Finder of Fact without a jury.

A detailed itemization of the time expended by affiants since June 30, 1974 is attached hereto. Following each entry in said itemization appears the initial "A" for Anderson and this is followed by the number of hours spent by Kenneth L. Anderson concerning the item listed. There is also following each entry the initial "H" for Hamilton and this is followed by the number of hours spent by A. Scott Hamilton, Jr., concerning the item listed.

The attached itemization indicates that Kenneth L. Anderson has devoted at least 474 hours to this matter since June 30, 1970 and that A. Scott Hamilton, Jr., has devoted at least 172 hours to this action since that time. In view of the fact that this case had to be briefed and argued again in the Sixth Circuit Court of Appeals and that a Response had to be filed in the Supreme Court to the Petition for Writ of Certiorari and that the case had to be prepared for trial on two separate occasions and that the case then had to be briefed and tendered Findings of Fact and Conclusions of Law prepared, affiants respectfully submit that a reasonable attorneys' fee to be awarded to the plaintiff for their efforts considering the time spent and nature of services rendered would be the sum of $75,000.00.

(s) A. Scott Hamilton, Jr.
(s) Kenneth L. Anderson

Subscribed and sworn to before me by A. Scott Hamilton, Jr., and Kenneth L. Anderson this September 4, 1974.

My commission expires: July 24, 1976.

(s) Debbie Hall Suratt
Notary Public
Kentucky State at Large

It is hereby certified that a copy of the foregoing Joint Affidavit was delivered Mr. Albert F. Reutlinger, Middleton, Reutlinger & Baird, 501 South Second Street, Louisville, Kentucky, Counsel for Defendants, this September 4th, 1974.

(s) Kenneth L. Anderson

ITEMIZATION OF TIME OF KENNETH L. ANDERSON AND A. SCOTT HAMILTON, JR., COUNSEL FOR FORTNER ENTERPRISES, INC.

1970

July 8 — Receipt and review of Trial Order, Motion for New Trial and Motion for Judgment Notwithstanding the Verdict (A. ¾ hr.) (H. ¾ hr.)

July 15 — Telephone conference Mr. Reutlinger and preparation of Agreed Order (A. ½ hr.)

Aug. 29 — Preparation for argument concerning defendants' Motions for New Trial and/or Judgment Notwithstanding the Verdict (A. 5 hrs.)

Aug. 30 — Conference with Mr. Hamilton and appearance in Court arguing defendants' Motions (A. 3 hrs.) (H. 3 hrs.)

Sept. 8

15 — Preparation of Judgment, Bill of Costs, Motion for attorneys' fee award and Affidavit (A. 10 hrs.) (H. 6 hrs.)

Sept. 18 — Appearance in Court (A. 1 hr.) (H. 1 hr.)

1971

Jan. 4 — Review of exhibits and telephone conference with Mr. Hamilton (A. 1¼) (H. ¼)

Jan. 6 — Arrangements for copies of exhibits (A. ½ hr.)

Jan. 26 — Review of Motions and Appellate Rules (A. ½ hr.)

1971

Jan. 27 Telephone conference with Mr. Hamilton and appearance in Court (A. 1½ hrs.) (H. 1½ hrs.)

Feb. 13 Organization of file (A. ¼ hr.)

Feb. 15-21 Review of testimony for inclusion in Appendix (A. 6½ hrs.)

Mar. 4 Telephone conference and conference with Mr. Hamilton (A. 1¼ hrs.) (H. 1¼ hrs.)

Mar. 6 Further review of transcript of testimony (A. 1 hr.)

Mar. 8 Further work on Appendix (A. 2 hrs.)

Mar. 10 Review of Exhibits (A. 1½ hrs.)

Mar. 16 Telephone conference Mr. Hamilton and further review of file for Appendix (A. 2¼ hrs.) (H. ¼ hr.)

Mar. 17 Review of Transcript of Evidence in view of Mr. Reutlinger's letter, Memorandum and letter (A. 2½ hrs.)

Mar. 22 Telephone conference with Mr. Hamilton and telephone call to Mr. Reutlinger leaving word (A. ½ hrs.) (H. ⅓ hr.)

Mar. 23 Telephone calls from Messrs. Reutlinger and Hopson; letter to the Clerk; work on Appendix (A. 1 hr.)

Mar. 25 Telephone call to Mr. Reutlinger (A. ¼ hr.)

Mar. 26 Work on Appendix (A. 3 hrs.)

Mar. 29 Conference at Westerfield-Bonte (A. ½ hr.)

Apr. 5 Telephone conference with Mr. Reutlinger (A. ¼ hr.)

Apr. 14 Telephone conference with Mr. Reutlinger (A. ¼)

1971

Apr. 21 Telephone conference with Mr. Reutlinger (A. ⅛)

July 7 Review of defendants' Brief in Sixth Circuit (A. 2 hrs.) (H. 1 hr.)

July 12 Two telephone calls to Mr. Hamilton leaving word (A. ⅓)

July 14 Telephone conference with Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

July 14 Work on appellee's Brief (A. 2 hrs.)

July 15 Work on appellee's brief (A. 3 hrs.)

July 17 Work on appellee's Brief (A. 3 hrs.)

July 19 Attempts to reach Mr. Hamilton by telephone A. ⅓ hr.)

July 20 Work on appellee's Brief (A. 9 hrs.)

July 21 Work on appellee's Brief (A. 11¼ hrs.)

July 22 Work on appellee's Brief (A. 11 hrs.)

July 23 Work on appellee's Brief (A. 5 hrs.)

July 24 Work on appellee's Brief (A. 8 hrs.)

July 26 Work on appellee's Brief (A. 5 hrs.)

July 27 Review of draft of Brief (A. ½ hr.) (H. ½ hr.)

July 30 Review of proof of Brief (A. 2hrs.) (H. 2 hrs.)

Aug. 19 Review of Reply Brief (A. ½ hr.) (H. ½ hr.)

Aug. 20 Further review of Reply Brief (A. 1 hr.)

Aug. 23 Telephone conference with Mr. Hopson and review of Reply Brief (A. 1 hr.)

Aug. 24 Further review of Reply Brief and telephone conference with Mr. Hopson (A. ¾ hr.)

Sept. 3 Telephone call from Mr. Flynn (A. ¼ hr.)

Oct. 6 Organization of file for argument before Sixth Circuit (A. 1 hr.)

Oct. 7 Trip to Cincinnati and preparation for argument before Sixth Circuit (A. 12 hrs.) (H. 12 hrs.)

1971

Oct. 8 Further preparation for argument and argument before Sixth Circuit and return to Louisville (A. 4 hrs.) (H. 4 hrs.)

Dec. 17 Receipt and review of Sixth Circuit Opinion and calls to Messrs. Hamilton, Hopson and Reutlinger (A. 1 hr.) (H. 1 hr.)

Dec. 17 Further telephone conference with Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

1972

Jan. 4 Telephone conference with Mr. Hopson (A. ¼ hr.)

Jan. 7 Telephone conference with Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

Feb. 18 Telephone conference with Mr. Hopson (A. ¼ hr.)

Feb. 23 Work on Response to Petition for Certiorari and telephone conference Mr. Hopson (A. 2½ hrs.)

Feb. 24 Telephone calls from Mr. Reutlinger (A. ⅓ hr.)

Mar. 5 Work on Response to Petition for Certiorari (A. 3 hrs.)

Mar. 6 Call to Supreme Court and 2 telephone conferences with Mr. Hamilton (A. 1¼ hrs.) (H. 1 hr.)

Mar. 26 Further review of defendant's Petition for Writ of Certiorari (A. ½ hr.)

Apr. 1 Work on Response to Petition (A. 7 hrs.)

Apr. 2 Work on Response to Petition (A. 4 hrs.)

Apr. 3 Telephone conference with Mr. Hamilton; complete Response to Petition (A. 3¼) (H. ¼)

Apr. 4 Telephone conference with Mr. Hopson; completion of Response to Petition and delivery of Brief to printer (A. 1¼ hrs.)

1972

Apr. 8 Review of proof of Response to Petition (A. ½ hr.)

Apr. 9 Preparation of appearance form for Supreme Court, certificate of service and letter (A. ½ hr.)

Apr. 10 Receipt of Response from printer and service of same (A. ½ hr.)

May 23 Telephone calls to Messrs. Hamilton and Fortner (A. ½ hr.) (H. ½ hr.)

May 26 Telephone call from Mr. Fortner; telephone call to Mr. Hamilton (A. ⅓) (H. ⅓)

June 20 Calls to Messrs. Hamilton and Reutlinger (A. ¼ hr.)

July 6 Telephone call from and conference with Mr. Reutlinger (A. ½ hr.)

July 12 Telephone conference with Judge Gordon; telephone calls to and from Mr. Reutlinger; telephone call to Mr. Hamilton leaving word (A. ¾)

July 13 Telephone conference with Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

July 19 Preparation for hearing and conference with Mr. Hamilton and hearing before Judge Gordon (A. 2½ hrs.) (H. 2½)

Aug. 10 Preparation of Memorandum (A. 1 hr.)

Aug. 23 Telephone conference with Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

Aug. 27 Work on Memorandum (A. 1 hr.)

Aug. 29 Review of Memorandum and call to Mr. Hamilton (A. ½ hr.) (H. ½ hr.)

Sept. 8 Telephone conference with Mr. Hamilton; telephone conference with Mr. Hopson; attendance at pre-trial conference (A. 1½ hrs.) (H. 1¼ hrs.)

1972

Sept. 9 Telephone call to Mr. Hamilton's office (A. ¼ hr.)

Sept. 12 Telephone conference with Mr. Hopson and Letter to Mr. Reutlinger (A. ½ hr.)

Sept. 25 Telephone call from Mr. Hopson (A. ¼ hr.)

Oct. 3 Telephone conference Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

Oct. 26 Telephone call from Mr. Hopson; telephone call to Mr. Reutlinger (A. ½ hr.)

Nov. 9 Telephone conference Mr. Hopson (A. ½ hr.)

Nov. 13 Conference with Mr. Hamilton (A. 1½ hrs.) (H. 1½ hrs.)

Nov. 14 Telephone call from Mr. Fortner; telephone calls to Mr. Hopson (A. ¾ hr.)

Nov. 18 Preliminary review of file (A. ½ hr.)

Nov. 22 Telephone conference Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

Nov. 29 Telephone call to Mr. Reutlinger; preparation of Order and letter (A. ½ hrs.)

Nov. 30 Conference with Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

Dec. 4 Two telephone calls to Mr. Hamilton's office leaving messages (A. ¼ hr.)

Dec. 5 Telephone conference with Mr. Hamilton; telephone conference with Mr. Reutlinger (A. ½ hr.) (H. ¼ hr.)

Dec. 6 Telephone call from Mr. Hamilton (A. ⅙ hr.) (H. ⅙ hr.)

Dec. 11-

1973

1/10/73 Preliminary preparation for trial including contacts with various witnesses, complete review of

1973

previous record and all exhibits, preparation and filing of Interrogatories and numerous conferences with Mr. Hamilton (A. 49 hrs.) (H. 29 hrs.)

Jan. 26 Review of defendants' Memorandum (A. ¼ hr.)

Feb. 21 Checking file at Clerk's office (A. ⅓ hr.)

Feb. 26 Call to Judge Gordon leaving word and telephone call from Judge Gordon (A. ½ hr.)

Feb. 27 Telephone call to Mr. Reutlinger leaving word (A. ⅙ hr.)

Feb. 28 Two telephone calls to Mr. Hamilton leaving word (A. ⅓ hr.)

Mar. 1 Telephone calls attempting to locate Judge Gordon; telephone call from Mr. Reutlinger; telephone call to Mr. Hamilton leaving word; telephone call to Judge's Secretary; brief conference with Mr. Reutlinger; telephone call from Judge's Secretary; telephone call to Mr. Reutlinger; preparation for trial (A. 2½ hrs.) (H. ¾ hrs.)

Mar. 2-

Mar. 13 Final preparation for trial, including conferences with Mr. Hamilton and arrangements for and meetings with witnesses and organization of exhibits (A. 51½ hrs.) (H. 28 hrs.)

Mar. 14 Commencement of trial and preparation for following day (A. 12 hrs.) (H. 12 hrs.)

Mar. 15 Appearance in Court at which time after considerable discussion, mistrial declared due to adverse publicity; calls to witnesses advising of mistrial (A. 3½ hrs.) (H. 3½ hrs.)

Mar. 16 Preparation of outline of witnesses' testimony (A. 4 hrs.)

1973

Mar. 19 Letter to Dr. Masten; call to Mr. Hamilton; call to Court Reporter (A. ½ hr.) (H. ¼ hr.)

Aug. 30 Conference with Clerk re status of case (A. ¼ hr.) (H. ¼ hr.)

Sept. 15 Preparation of Interrogatories and letter to Mr. Hamilton (A. 1½ hrs.)

Sept. 16 Review of Interrogatories and letter (H. 1½ hrs.)

Sept. 19 Telephone conference with Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

Oct. 16-

Nov. 15 Preparation for trial, including arrangements for and conferences with witnesses and review of exhibits and issuance of subpoenas and complete organization of case (A. 95½ hrs.) (H. 22 hrs.)

Nov. 16 Presentation of supplemental evidence after conference with witness, Masten (A. 6½ hrs.) (H. 6½ hrs.)

Nov. 18 Preparation for cross-examination of defendants' witnesses (A. 1 hr.) (H. 1 hr.)

Nov. 20 Appearance in Court on presentation of defendants' supplemental evidence (A. 2 hrs.) (H. 2 hrs.)

Nov. 28 Letter to Dr. Masten (A. ¼ hr.)

Nov. 29 Letter to Mr. Hamilton (A. ¼ hr.)

Nov. 30 Review of letter (H. ¼ hr.)

Dec. 7 Letter to Dr. Masten (A. ¼ hr.)

Dec. 21 Organization of file (A. ½ hr.)

1974

Jan. 14-

Feb. 19 Preparation of proposed Findings of Fact and Conclusions of Law and Memorandum (A. 24½ hrs.) (H. 9½ hrs.)

1974

Apr. 21-

May 14 Review of defendants' proposed Findings of Fact and Conclusions of Law; conferences with Messrs. Hamilton and Hopson and preparation of Reply Memorandum (A. 10 hrs) (H. 4¾ hrs.)

May 29 Telephone conference with Mr. Hopson and calls to Clerk's office (A. ½ hr.)

May 30 Telephone conference with Messrs. Hamilton and Hopson (A. ½ hr.) (H. ½ hr.)

June 28 Telephone conference with Mr. Hopson (A. ¼ hr.)

July 16 Telephone call from Mr. Hopson (A. ⅛ hr.)

Aug. 19 Telephone calls to Messrs. Reutlinger, Hamilton and Hopson and review of procedure; conference with Mr. Hamilton and Mr. Hopson and telephone conference with Mr. Reutlinger (A. 2 hrs.) (H. 2 hrs.)

Aug. 20 Two telephone conferences with Mr. Hamilton and research concerning questions raised by Mr. Reutlinger after conference with Mr. Reutlinger (A. 4 hrs.) (H. 1 hr.)

Aug. 21 Further research and telephone conference with Mr. Hamilton (A. 2½ hrs.) (H. ½ hr.)

Aug. 22 Work on costs and research (A. 2¼ hrs.)

Aug. 23 Telephone conference Mr. Hamilton; 2 calls to Mr. Reutlinger; call to Judge's office (A. ½ hr.) (H. ¼ hr.)

Aug. 26 Telephone conference Judge; telephone calls to and from Mr. Hamilton and research (A. 1½ hr.) (H. ¼ hr.)

Aug. 27 Telephone conference Mr. Reutlinger (A. ¼ hr.)

1974

Aug. 28 Telephone conference Judge Gordon and telephone conference Mr. Reutlinger (A. ½ hr.)

Aug. 30 Calls to Hamilton leaving word (A. ¼ hr.)

Sept. 1 Telephone conference Mr. Hamilton (A. ¼ hr.) (H. ¼ hr.)

Sept. 2 Work on Judgment, Affidavit and Memorandum (A. 4 hrs.)

Sept. 3 Further work on Affidavit and calls to Mr. Hamilton (A. 1 hr.) (H. ¼ hr.)

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TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Fortner Enterprises, Inc., Plaintiff,
v.
United States Steel Corporation, United States Steel Homes Credit Corporation, Defendants,

Civil Action No. 4392

Before Honorable James F. Gordon, United States District Judge for the Western District of Kentucky, at Louisville, Kentucky, on Monday, November 12, 1973, Friday, November 16, 1973, and Tuesday, November 20, 1973, Without a Jury.

Appearances:

For Plaintiff: Kenneth L. Anderson, Esq.,
1805 Ky. Home Life Bldg.,
A. Scott Hamilton, Jr., Esq.,
310 W. Liberty Street,
Louisville, Kentucky

For Defendants: Albert F. Reutlinger, Esq.,
MacDonald Flynn, Esq.,
501 S. Second Street,
Louisville, Kentucky

Reporter: C. L. Sterling
Room 265 Federal Building
Louisville, Kentucky

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The Captioned Matter being heard by the court, in chambers, at about the hour of 9:22 A. M., on Monday, November 12, 1973, the following proceedings occurred:

Mr. Anderson: Your Honor; this case has been going on for over eleven years now. It has been to the Sixth Circuit twice; heard by the Supreme Court once and a Petition for Certiorari has been turned down by the Supreme Court a second time.

We have had one thirty-day trial of this case. We started to try it back in March of this year. Mr. Hamilton and I, since March, off and on, have been talking about in what manner this case could be disposed of which not do an injustice to the parties, but which would hopefully eliminate or expendite bringing this lawsuit to a conclusion.

It just seems terrible to us and we don't attach any blame to anybody, but it just seems terrible to us that litigation could go on for eleven years and be at a trial stage at this point with all of the problems that we still have this litigation, not only in terms of the very great difficulties which we have previously discussed with how to handle this trial and the, uh, indications that if we try this case before a jury that it's going to—we may spend as much time back here in Chambers talking about what

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is admissible under this business of trying only a portion of this lawsuit.

We have the complexities of the economic evidence which is going to be introduced this time in the form of—for both parties, of PhD's and Economists, giving their opinions about economic power and so forth.

The Plaintiff is faced with a record here of, uh, in addition of the Defendants whereby they have insisted on, uh, upon a twelve-man jury, or they have moved for a twelve-many jury, which their motion has been overruled, uh, which gives them another basis for an attempt at an appeal.

Finally, yesterday afternoon, Mr. Hamilton and I after discussion with the President of Plaintiff, Mr. Fortner, decided that we would make this proposition to the Court and to the Defendants which we feel should be palatable to the Defendants and which we hope and trust would be palatable to the Court.

That is simply this, Your Honor; the Plaintiff is willing to waive a jury trial; to let this Court decide this case, and we would suggest that the following procedure be followed; we have voluminous testimony that's already been given from the trial in 1970.

Each party has some additional witnesses whom they have designated. We would suggest that the Court hear whatever

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whatever additional testimony either of the parties would desire to submit, take the remainder of the testimony from the Record which already exists, and that after testimony has been given that each party be given ample opportunity to brief the case for the Court, summarizing the evidence that they rely upon and that the Court then take the matter under submission.

We feel that in this manner this case can be finally brought to rest without—and obviously, it means from the lawyers' standpoint, as much or maybe some additional time spent, but from the Court's standpoint, from the expense of another jury trial, it eliminates that. So, that is our first point, Your Honor.

By the Court: Well, of course, from my point of view, I—if you want an expression from me, I'll do it that way if the parties want to agree to it. Of course, I can't make them agree to it.

Mr. Anderson: Obviously, we are perfectly aware, Your Honor, under Rule 38(D), that our waiver of jury trial has to be with the consent of the Defendants.

Mr. Reutlinger: Judge, let me make this comment at this point and say I am somewhat at a disadvantage, and I'm not being critical of Ken, but Mr.

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Buchanan—Mr. Buchanan, whom you know, is house counsel—you will remember him; the man that had the nervous tremors when you gave the directed verdict?

By the Court: The one we had to help out of the room.

Mr. Reutlinger: That's right; he had planned to be here as house counsel. Mr. Flynn, of course, is independent counsel, but Mr. Buchanan called me Friday and told me he would not be here for a week because he was suddenly thrust into the position of other litigation which required him to be elsewhere.

Coming as a surprise and without having house counsel here at least to consult, I cannot make a. y commitment either way. I can see some merit to what Mr. Anderson says. I can, from our standpoint, see some drawbacks. We obviously are ready for trial at this point. With the Court's permission I'd like t. withdraw for a moment to discuss with my colleague and perhaps we can make a very definitive response in a short time.

By the Court: You want to try and get Mr. Buchanan? All right. Well, Mr. Marshal, tell the jury that we are trying to arrange a format that might lead to more speedy handling of the case and just let it go at that and if they'd like to get a cup of coffee they

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may do so and come back in forty-five minutes.

Mr. Flynn: Might we ask Ken a question, Your Honor? Ken, from your proposal, are you contemplating that the damages would remain as brought in by the jury at the first trial? In other words, that portion of the mandate would not be changed.

Mr. Anderson: Yes, sir.

Mr. Flynn: We would be trying to Judge Gordon as the Court sitting without a jury, just the liability issues?

Mr. Anderson: Liability issues; the Court has previously ruled those were the issues to be tried; yes, sir.

Mr. Flynn: Okay.

(Whereupon, a short recess was taken to about the hour of 10:00 A.M., and the following proceedings occurred, in chambers:)

By the Court: All right, gentlemen.

Mr. Reutlinger: If the Court please; we have considered Mr. Anderson's proposal and talked to Mr. Buchanan and I would seek of him a little more enlightenment on some points and then I think we can make the

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final decision. If one of the objects is to save time, it would occur to me that perhaps the expenditure of some time could, by reviewing the record, could in the long run, save the Court's time and I'm not thinking in terms of months or years, but days, weeks, or something in that nature.

By the Court: Uh huh.

Mr. Reutlinger: Mr. Fortner and Mr. Horn are under subpoena to me. I would want an understanding that if required, both of those gentlemen would respond again because there are matters that they know of which we would like to have brought before the Court.

Mr. Horn, while not a hostile witness, is a witness for the Plaintiff. Of course, Mr. Fortner is hostile in a legal sense. We would want to know if Mr. Anderson contemplates bringing in witnesses other than those we now know about, and as far as immediate procedure goes, uh, by virtue of the message I got from Mr. Anderson last Friday that he would take a week to complete, we are obviously not ready to proceed this week with our witnesses at all, which is related, in a sense, to the time problem we have here, generally.

Mr. Anderson: All right, sir. Well, first of all as far as the timing is concerned, I see no problem in making any adjustment time-wise, that, uh,

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that we all can work out and, uh, with the Court.

By the Court: Well now, there is no problem with the Court because the Court—I assume, if I understand you all, because I've got two weeks set aside.

Mr. Anderson: What I had contemplated was, since my expert, Dr. Masten, was not available until Friday of this week, what I had contemplated was putting on—uh, what I thought might be possible would be to put on the live testimony that we would want to put on on Friday of this week and then, as you and I had discussed earlier, that would leave you, uh, Monday and Tuesday of next week to put your proof on, Al.

Mr. Reutlinger: Uh huh.

Mr. Anderson: I certainly did not contemplate calling, and had not contemplated that either side would call any witnesses other than those whose testimony is already in the Record and those additional witnesses listed on our respective witness lists.

As far as Mr. Fortner is concerned, obviously, there is no problem about Mr. Fortner. The Court doesn't need

to but if the Court wants to and the Defendants want the Court to, they can call—Mr. Fortner can be called in here by the Court to appear when you say to have him.

Mr. Reutlinger: No, I'm sure that's

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not necessary if you say he will be available.

Mr. Anderson: Obviously, as far as Mr. Horn is concerned I advised Mr. Horn when I met with him last week that we had the same understanding that we had the last time.

Mr. Reutlinger: Correct; and he would appear today, but was under subpoena.

Mr. Anderson: That he was under subpoena from both of us that he would appear when called with as much advance notice being given him as possible and that, uh, I think, answers all of the questions that you raised. If it didn't, why refresh me and I—

Mr. Reutlinger: I believe it answers them all; anything we've overlooked?

Mr. Flynn: No.

Mr. Reutlinger: Well, Judge,, with that understanding, I think we can agree that the Court will hear it. We, as yet, of course, don't know what we will present live. We have two new witnesses. I'm sure we want to present them live.

We will have to see what the others have in the record and would reserve that right. Ken, well, you know we are going to propose a substitution for Meyers with the new Comptroller over here, but I doubt that we would bring

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anybody in on that; that was in the record earlier, if Your Honor please, by way of avowal.

By the Court: Uh huh.

Mr. Reutlinger: And was not admitted. We certainly

want to submit the proof. Whether you accept it or not would, of course, be your province again, but I don't think any of these things pose any problem other than mechanical.

Mr. Anderson: I don't think so. Your Honor, on my objection, would not allow Mr. Meyers previously to testify as to certain proof which Mr. Reutlinger put on so he offered it as an avowal in the Record as to what Mr. Meyers would say.

Now, it is my understanding that Mr. Meyers is no longer across the river and there is some other Comptroller over there. We still preserve, of course, our objections to the admissibility of his testimony.

Mr. Reutlinger: Oh, yes.

Mr. Anderson: As far as the technicality of substitution of one body for another, uh, obviously, that—I told Mr. Reutlinger that was no problem.

Mr. Reutlinger: Why don't we, with the Court's permission, Ken, leave it on this basis; unless the Court feels otherwise and unless something unforeseen

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occurs with your planning, we would resume here on Friday with Dr. Masten?

Mr. Anderson: Right. Now, it mgiht be—I don't—

Mr. Reutlinger: (Interrupting) I understand. I say, unless something unforeseen occurs.

Mr. Anderson: I might want to ask Mr. Fortner just a few additional questions.

Mr. Reutlinger: Fine: I'm not trying to limit you to that.

Mr. Anderson: This came up on Sunday. My purpose, and I assume all our purposes would be not to duplicate what is already in the record.

Mr. Reutlinger: Obviously that.

Mr. Anderson: But to supplement.

Mr. Reutlinger: No point in that.

Mr. Anderson: But my anticipation would be possibly Mr. Fortner, uh, a few questions from Mr. Fortner, Dr. Masten, Charley Wills who has not testified before, and Ralph Logan, who has not testified before.

Mr. Reutlinger: I'm sure you can include that in a day without a jury.

Mr. Anderson: And I might beg your indulgence on Friday to waive the order to get Dr. Masten

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on and off.

Mr. Reutlinger: Well, there's no problem there. Judge, while we are discussing things, why wouldn't we, if Ken agrees, stipulate two things; that the exhibits, including interrogatories and exhibits which accompanied them which were in the Record and admitted in June of 1970, be admitted in this Record for all purposes except as to that material which is not pertinent, such as to damages?

By the Court: Well, I, of course—

Mr. Reutlinger: (Interrupting) I understand Ken is going to offer that by way of avowal to protect his record, and then also stipulate that both sides waive the Order of Proof because I am at the moment, unsure as to who is on my payroll and who has since retired, and we would want the same flexibility. Is there any objection to that?

Mr. Anderson: I see no objection to that at all.

Mr. Reutlinger: All right; lets—

Mr. Anderson: (Interrupting) From the technical—no, absolutely no objection to that proposal.

Mr. Reutlinger: Yes.

Mr. Anderson: I was just more or

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less thinking out loud. From the—we have—all exhibits are a part of the Record; all right?

Mr. Reutlinger: That's correct.

Mr. Anderson: All testimony that has been given?

Mr. Reutlinger: That's right.

Mr. Anderson: (Continuing) Given before is a part of the Record, all right?

Mr. Reutlinger: Right.

Mr. Flynn: You are saying that the prior trial record will be part of the Record of this trial?

Mr. Anderson: Of the Record here.

Mr. Reutlinger: Right.

Mr. Anderson: And my view of the thing is that, uh, if I, in my briefing of the matter, refer to certain exhibits or testimony that—uh, to which you object, you, in your brief, can point out your objection.

Mr. Reutlinger: Sure, yes.

Mr. Anderson: And the Court can look at the material—

Mr. Reutlinger: Uh huh.

Mr. Flynn: Right.

Mr. Anderson: Or ignore it, as he sees fit.

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By the Court: Well now, if you feel that on Friday, the 16th, you can wind up your ball of wax, then when would you want to put yours on?

Mr. Reutlinger: Well, we might as well start on Monday, Judge, because I've got people slated for Monday—well, slated—I've got them kind of alerted for the first part of the week, depending on Ken's cross examination.

By the Court: Well, the only thing, Al, that I have in the two week period is a two o'clock on Monday. I've got a Bankruptcy hearing.

Mr. Reutlinger: Monday, the 19th?

By the Court: Monday, the 19th, yes; relative to this Auto Emission Company failure. So, I was going to run

until two o'clock on Monday, assuming that we were going to try.

Mr. Reutlinger: All right.

By the Court: And then adjourn and hear that thing. So, if Tuesday, the 20th suits you just as well, we wouldn't have any interruption; if you think you can be through by two o'clock on Monday, why we will do it Monday.

Mr. Reutlinger: Judge could I ask your indulgence to leave Monday morning, Tuesday, and

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Wednesday open, as you now have them?

By the Court: Oh, yes.

Mr. Reutlinger: And I will, of course, talk to my people, witnesses, and Ken, and perhaps before the week is out, be able to free more of the Court's time.

By the Court: Well, that is all right. Now, on Monday, we can run up to two o'clock. That's the only thing that I had to crush in here was that thing on Monday.

Mr. Reutlinger: Uh huh; that's all right, and if the Court could do that for us, we will see what we can do.

By the Court: Well, it doesn't make any difference to me. I just wanted you all to know that we would have that one interruption.

Mr. Reutlinger: Bearing that in mind, we might try to eliminate Monday; I don't know.

Mr. Flynn: Ken, as far as witnesses from the Defendant Companies, do I understand correctly you are now not contemplating calling them live?

Mr. Reutlinger: Do you want Mack?

Mr. Flynn: For example, Mack?

Mr. Anderson: No; I will simply

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use Mr. Mack's testimony from the previous trial.

Mr. Reutlinger: Right.

Mr. Anderson: I have got in there what I want.

Mr. Flynn: I'm sure you do.

(General Laughter at This Point.)

Mr. Reutlinger: Well, I just wanted to know whether we want to free him or not. As far as you're concerned, he's free?

Mr. Anderson: As far as I am concerned, I will rely on his testimony previously.

Mr. Reutlinger: That is the only commitment we have with you to produce, isn't it? Mr. Black, you know, while here wouldn't be permitted to testify any how. His doctor says no, thank you. Mr. Black had a heart attack about three weeks ago.

Mr. Anderson: Well, I think any testimony of Mr. Black we already have in the record.

Mr. Flynn: And his deposition too.

Mr. Anderson: So, we wouldn't need Mr. Black either.

Mr. Reutlinger: Well, Harry will not simply be physically up to testifying, his doctor says.

Mr. Anderson: I wondered when I

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talked to him out there this morning what he was doing here.

Mr. Reutlinger: He's my window dressing; told him to wear his suit and all. Okay.

Mr. Anderson: We sincerely believe this may finally put this case to rest.

By the Court: All right, gentlemen.

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(Whereupon, proceedings were convened in open court and the following proceedings occurred:)

By the Court: Ladies and gentlemen; this morning we were to begin trial of a case for Fortner Enterprises v. The United States Steel Company, an antitrust suit, which had

been pending in this court for some time and had been to the Supreme Court of the United States twice.

We tried it once and it took thirty days. The parties have agreed to allow the Court to try the case without a jury and therefore, you will not be subjected to that long period of punishment and I will suffer it in your behalf and therefore, the Court appreciates your attendance

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today and you are now dismissed. Mr. Marshal, maybe you had better check with the Clerk when we would like to have these jurors back.

It will be of some interest to you to know that we try, of those cases that go to trial—civil cases, we will probably try, normally, eighty per cent of those without a jury. Now, in many of them, under the Federal Statutes, they are not entitled to a trial by jury, but even among those that are, the percentage of cases where the attorneys agree to allow the Court to try them without a jury is very high, and if that were not the case, it would just be impossible for us to keep those dockets current because the Court can try a case, generally, in about a third of the time that a jury can try it.

All right; when do we need the jurors back?

The Court Clerk: They will be notified.

By the Court. You will be notified. All right; thank you for your attendance today.

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(Reconvened on Friday, November 16, 1973, with appearances as noted heretofore, and at about the hour of 9:30 A.M., the following proceedings occurred:)

By the Court: All right, gentlemen; what say you for the Plaintiff?

Mr. Anderson: Plaintiff is ready: Your Honor.

By the Court: And for the Defendants?

Mr. Reutlinger: Defendant is ready, Your Honor please.

Mr. Anderson: If the Court please; we would like to call as a witness, Dr. John Masten.

By the Court: All right; come around, Doctor; raise your right hand and be sworn, please.

DR. JOHN T. MASTEN, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination:

By Mr. Anderson:

Q. Dr. Masten, would you give us your name, please?

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A. John T. Masten.

Q. And where do you live, sir?

A. I live in Athens, Georgia.

Q. And what is your business, or occupation at this time, sir?

A. I'm the Georgia Bankers Association—Professor of Banking at the University of Georgia.

Q. And how long have you held that position at the University of Georgia?

A. Well, let's see; I'll—I'd have to refresh my memory. I'm in my seventh year, so, uh, that's—all right; since June of 1967.

A. I teach a basic course in Money and Banking. I teach at the undergraduate level, a course in commercial banking which essentially, of course, is bank management and teach, at the graduate level, of course, in Money and Capital.

Q. All right; and I forgot to ask you a moment ago; would you give us your educational background, please, sir?

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A. Well, I have a Bachelor and a Masters Degree from the University of Illinois and a PhD from the University of North Carolina.

Q. And prior to going to the University of Georgia, where did you teach, sir?

A. I was a Professor at the University of Kentucky for nineteen years from 1948 to 1967.

Q. All right. So, I take it you went from the University of Kentucky to the University of Georgia?

A. That's right.

Q. Now, when you left the University of Kentucky, uh, were you a full professor, or what?

A. Well, I was full professor at the time I left. I had been within the period of about five years before I left, Head of the Department of Economics, and also, Director of Graduate Study in Economics.

Q. All right; had your time, or any of your time while you were at the University of Kentucky, been devoted to the financial or banking field?

A. Yes, that was the principal area of my teaching responsibility at the University of Kentucky. I also was active in the program sponsored by the State Department of Banking, the University of Kentucky and the Kentucky Bankers Association, related to the annual program of the Kentucky School of Banking. I still maintain that connection with the Kentucky School of Banking.

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Q. All right; is this the Educational Arm of the Kentucky State Bankers Association?

A. Well, it is one of the educational arms, yes. They have other conferences and workshops, but this is the principal arm of the Association in terms of providing

education for younger bankers—people who are on the way up.

Q. All right; could you briefly describe to the Court the types of, uh, courses or seminars that are conducted under the auspices of the Kentucky State Bankers Association?

A. Well, I—I might say that what is done at the University of Kentucky is very similar to the responsibilities I have at the University of Georgia because I am the program director of the Georgia Banking School as well as the Kentucky Banking School and for both schools there is a program that covers various areas of banking, investments, management of bank funds, manpower utilization and probably the topic that is given the most attention is bank lending.

In this respect both schools have a correspondence assignment program between the summer sessions. In both schools, uh, loan cases are required for purposes of analysis. The banks are also required to submit cases so

that between the two states I receive about a hundred and twenty or thirty bank loans cases each year. There are other areas that are covered; public speaking—uh, possibly I should have mentioned investments, uh, well, activities that are related primarily to banking and, uh, the economics, the environment of banking, and the application of banking. I think this is what we try to present; courses that relate to environment in which banking is conducted as well as courses that relate specifically to the activities of the banker.

Q. All right, sir. You mentioned case studies, uh, that you receive from both Kentucky and Georgia banks.

A. Right.

Q. Would you explain to the Court a little more what those involve?

A. In the case work requirement it's a little different as between the Georgia school and the Kentucky school because the Georgia School is a three-year school whereas the Kentucky School is a two-year school.

In the Georgia School we use a combination of case materials. There is a book of cases prepared by Reed & Wooden, I suppose, that about three-fourths of this book carries loan cases, but there are cases in other areas such as Branch Location, Recruiting and Hiring of Executives,

and cases of that nature. In addition, in both schools, particularly in the Kentucky School, we prepare our own cases based upon materials received from the commercial banks.

These loan cases involve all kinds of loans. They may be automobile loans or loans for personal purposes, or it may be a real estate loan, or it may be a commercial loan. If it's a commercial loan it may involve almost any area of bank lending. It may be a real—uh, retail store or it may be a lumber dealer or it may be any kind of case.

These are then used as a part of the correspondence work. They are also used for workshop sessions that we have during resident section of the school where the bankers come in and they meet in smaller groups and they evaluate these cases, making some decisions as to whether they would or would not make the loan, and under what conditions they would make the loan.

Q. All right, sir. Now, how long have you been, or, yes, how long have you been associated with the Kentucky Bankers Association and the Kentucky Banking School?

A. Well, I went to the University of Kentucky in June of 1948—I came during that summer. I did not have any particular association with it that summer since it was

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my first summer, but I have been associated with it every year—well, let's say since 1949.

A. All right, sir.

A. So, it's nearly twenty-five years.

Q. Dr. Masten, do you devote, and have you devoted during the past twenty-five years, uh, much or little time to, uh, lending and credit matters within the realm of, uh, banking and—uh, the banking and financial field?

A. Yes; in my work with the Kentucky Bankers Association and in my work with the two banking associations at the present time I am involved in a gathering of cases and working with bankers on these case materials. I can't tell yo uthe first time that I prepared cases, but it was very early during this twenty-five year period and I've been preparing cases and working in this area ever since.

Mr. Anderson: All right, sir. Now, if the Court please; without burdening the Court with another twenty minutes of testimony about additional qualifications, and I have furnished you a copy.

Mr. Reutlinger: No objection, if Your Honor please.

By the Court: All right.

Mr. Anderson: I would like to file it for the record.

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(Whereupon, a Document Containing Further Qualifications of Dr. John T. Masten, Was Marked for Identification as Plaintiff's Exhibit No. 500, and Received in Evidence.)

Q. Dr. Masten, turning to a couple of general things first; could you tell us, sir, if all loans are the same?

A. No, all loans are not the same. There is risk differential that makes each loan almost separate in its own characteristics.

Q. All right. Well, let's just, for purposes of illustration, take a land acquisition and development loan involving a six per cent interest rate, a half a point fee, a two year term, uh, where the amount of the loan represents 60 per cent of the cost to acquire the land and develop it, and contrastingly, with the same terms, the six per cent interest rate, the half point fee, the two year term, uh, but with the amount of the loan representing 100 per cent of the cost to acquire the land and develop it, and I use this strictly as an example at this point, uh, what is the difference between those two loans, sir?

A. Well, the difference would be primarily, in

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terms of risk. The hundred per cent loan, other things being equal, of course, would carry a much greater risk than the sixty per cent loan where the borrower has a forty per cent equity in the property.

Q. In the field of land acquisition and development loans, Dr. Masten, is it usual or unusual for personal guarantees to be required by the lender of officers of the borrower?

A. It would say that ordinarily, a lender would want some kind of a guarantee becaues we are back to the question of the degree of credit risk and we have indicated that each loan has its own risk characteristics. A lender would want to be protected insofar as possible by having some kind of guarantees, either in terms of the amount of the loan relative to the value of the property, or, uh, a guarantee by some third party so that the more collateral, the better the guarantees you can get, the less risk is going to be involved in making a loan.

By the Court: You are back to the old adage that they will loan you the money if you can prove you don't need it.

The Witness: That's right.

By the Court: That's always been my experience.

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The Witness: That's right.

Q. Now, Dr. Masten, I show you what has been previously marked as Plaintiff's Exhibit No. 5—that's the Loan Agreement, Mr. Reutlinger—uh, the Loan Agreement dated October 28, 1960, and ask you if you have, prior to this time, as, uh, at my request, uh, reviewed that Loan Agreement?

A. Yes, I have.

Q. I show you also Plaintiff's Exhibit No. 237, which is identified as Underwriting Agreement, and ask you if you have also reviewed that document at my request?

A. Yes, I've seen both of these.

Q. All right, sir. In addition, I show you Plaintiff's Exhibit No. 31, and Your Honor, I might point out that this was admitted into evidence in the previous Record, which does show that and initially, it was marked "Tendered", and I think that really ought to be marked off of there because it has been admitted into evidence and I don't want there to be any confusion.

By the Court: The Reporter can take off the word "Tendered."

Mr. Reutlinger: Mr. Anderson, what is the document?

Mr. Anderson: That is the

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United States Steel Annual Report.

Q. I will ask you if you have also reviewed that Plaintiff's Exhibit No. 31, at my request, sir?

A. Yes, I have.

Q. Dr. Masten, I also show you, attached to Plaintiff's Exhibit Two, the 1961 and '62—I'm sorry—yes, the 1961 and '62 Financial Statements of U. S. Steel Homes Credit Corporation, and ask you if you have also examined those documents at my request?

A. Yes, I have.

Q. All right, sir; I will leave those there in case and need them. Now, as a result of the work which you were doing at the University of Kentucky in 1959, '60 and 1961, would you state whether or not you were familiar at that time and are familiar now, uh, with the types of land acquisition and development loans, uh, that were made or available in Kentucky, including the Louisville and Jefferson County area?

A. Well, I have a general knowledge of bank, or lending principles, probably particular banks, but I would also have a general knowledge of the lending policies of other non-bank lenders. I would not unnecessarily know the specific details of each individual loan, but in general, I am aware of the principles that lenders would follow in

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making loans of this type.

Q. All right, sir; and was this general awareness in the financial community necessitated, at least in part, by the work you were doing with the bankers?

A. Yes, in part; right.

Q. Dr. Masten, having established that you have reviewed the documents which I have previously identified, I would like to ask you to assume that the land acquisition and development portions of the Loan Agreement identified as Plaintiff's Exhibit No. 5, represented one hundred per cent of the funds required to acquire the land which is the subject matter of that document, and to develop that land to the extent that it was not already developed.

I'll ask you further to assume that Plaintiff Fortner Enterprises at the time of this transaction on October 28, 1960, had a deficit of approximately $16,000; and to further assume that no personal guarantees were required of any officer of Fortner Enterprises of this loan, uh, as set forth in Plaintiff's Exhibit No. 5.

Now, assuming those facts to be true, and further assuming your review of the documents that I have identified, sir, do you have an opinion, uh, as to whether or not such a loan, under those circumstances, was available to the Fortner Enterprises, Inc., uh, from any other lending source, uh,

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during the period of time with which we are concerned, uh, 1959, through 1961?

A. In my opinion, a loan with this degree of risk, would not have been available from, let's call them the normal channels of credit, for development and construction lending. In other words, this was a very unique kind of loan; it was not the kind of loan that you would normally find in the Housing Credit Market at that time.

Q. Well, would you please explain to the Court, Dr. Masten, uh, what was unique about this loan?

A. Well, I think there are several elements that are—that make it unique. First of all, it was a loan for one hundred per cent of the land acquisition and development; that immediately is unique, particulraly for the period of time in question.

A loan of that type involves a very high risk and most lenders have to be at least reasonably prudent in lending funds, so that a prudent lender would have been unwilling to have made a loan involving a hundred per cent risk.

This was not a period of inflation; in fact, it was a period of great price stability. There was very little change in the wholesale price index during this period of time so that the lender couldn't have said, "All right; I'll

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make the loan now because I expect the value of this property to appreciate."

We didn't have the kind of a situation at that time that we have had in the early 1970's, for example, so that the

risk was definitely inherent. There was a definite risk inherent in a hundred per cent loan under conditions of economic stability, price stability, and another characteristic of this loan which makes it exceedingly unique is that the loan was guaranteed not by a affiliate of the borrower, but by an affiliate of the lender.

Frankly, I can't think of another instance where that is done. I have never run across that before, so that makes it very unique.

Also, the loan was tied to the condition that the borrow purchase homes from the United States Steel Homes Corporation. The borrower could not use the funds and go out into the market and acquire houses from any seller that he might have chosen. He had to buy the houses from the United States Steel Homes Corporation as a condition for getting this unique type of loan.

Now, the rate of interest that was charged was six per cent with a one-half per cent fee. Now, this rate is higher than the prime rate that prevailed at the time because I have looked it up and by interpolation, I assume the prime

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rate was changing at that time, but it must have been about four and a half per cent, however, when a strong borrower, let's say American Telephone & Telegraph, or General Motors, or United States Steel, borrows at the prime rate they are usually required to maintain a compensating balance with the bank. Traditionally, this is twenty per cent, although it may chnage, depending upon economic conditions, which means that the cost of credit to the borrower is higher than the prime rate.

If we have a prime rate today of nine and a half or nine and three quarters then the borrower is expected to keep a deposit in the bank—in that bank, of usually, twenty per cent, which means that he does not have the use of all

of the loan. He has the use of, let us say eighty per cent of the loan, but he pays the interest on the full amount of the loan.

So, the cost of the portion that he borrows is higher than the prime rate; so the prime rate, at four and a half per cent, must have meant, cost to the borrower at that time was either five or five and a half per cent.

Now, in the loan involving the Fortner Enterprise, uh, this—the degree of risk would, by no stretch of the imagination, qualify it, Forner, to have borrowed from a bank, or let's say for some other purpose, at the

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prime rate. They would have paid a substantial differential. So that, the rate, while it was above the prime rate, it was still low considering the risk involved in making the loan and certainly without the guarantee of the parent of the lender, it would have been very difficult to have gotten credit on those terms—virtually impossible, in my opinion, from any other source.

Q. All right, Doctor. Going back to one of the points that you made here, the point about, uh, the loan being guaranteed by the parent, United States Steel Corporation, uh, of the Credit Corporation, as we have called it, uh, could you elaborate some more about the, as you described it, the unusual character of that guarantee?

A. Well, possibly I can contrast this guarantee with the kind of a guarantee that you might expect in a credit transaction. Now, this would not involve all credit transactions, but in some instances, a lender will want a guarantee from a third party.

The third party, if you had a holding company structure, the third party might be the holding company that owns the subsidiary; that is, the subsidiary would have looked to its parent for payment. Now, it is this relationship that I regard as being very highly unique, and as I say, I have not run into this kind of a situation before.

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Ordinarily, it is a third party that guarantees the loan, an outside third party, or, uh, in a holding company structure, a higher level company, where the subsidiary is borrowing ing and the parent company may guarantee its loan.

Q. Doctor, would you state whether or not the relationship of the United States Steel Corporation with the Credit Corporation, uh, with the guarantee that you have just talked about, uh, whether or not that gives, uh, in your opinion, the Credit Corporation any advantage insofar as the type of risks that are involved with this type of loan?

A. Well, I would say that any kind of a guarantee would reduce the risk involved. Again, going back to any very simple illustration, if I lend you a hundred dollars and your colleague guarantees it, that reduces the risk, but again, we are back to the unique feature of this particular loan where the guarantee is by the parent—the parent of the lender.

Q. All right, sir. I believe that you have testified, and I don't want to step over the bounds here, but I believe that you have testified already that, in your opinion, uh, this was not a prudent loan for a conventional lender?

A. Right.

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Q. Well, what about other, uh, conventional lenders, Doctor; uh, can you tell us, for example, whether banks could make loans such as this, commercial banks?

A. Banks, uh, would be unable to make loans of this type by reason of statutory limitations; the limitations applied at the period of time in question; it is still applicable today. The same thing is true of savings and loan associations.

Now, that would leave us with the other major sources of funds, being insurance companies, pension funds, or possibly trust funds. The regulations governing these would be—would vary, but, uh, the point that I make in particular is that even for a lending—uh, for a lender who might legally have been able to make such a loan, it would not have been a prudent loan under the conditions at the time it was made.

Q. All right, sir. In your opinion, Doctor, because of the risks involved, would these other types of lending institutions, uh, in 1959, through 1961, have made such loans as we have described?

A. No, I do not believe they would have made such loans.

Q. Now, Doctor, again asking you to assume your review of the documents which I have previously

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described, and again, asking you to assume that the land acquisition and development portion of this loan represented one hundred per cent of the funds required to, uh, acquire the land in question and develop it, and again, that no personal guarantees of the loan were required of Mr. Fortner or any other officer of the Plaintiff, Fortner Enterprises, Inc., based on your studies, training, background, and the study of facts of this matter, do you have an opinion as to whether or not the Credit Corporation had, in the period 1959 through 1961, uh, economic power of any nature, with regard to the tie-in of the requirement of the purchase of the prefabricated house packages, uh, to the loan in question?

A. Well, by granting terms to the borrower that were so distinctly unique that it is almost inconceivable that the funds could have been acquired from any other source then the Credit Corporation had economic if that is the sense that you are using the term.

Q. Doctor, there has been mention at various other times of the credit market. Would you tell the Court whether there is one credit market, uh, or whether there are segments, or sectors of the credit market?

A. In terms of pure economic theory, you say that prices are determined by the supply and demand for funds, but then you quickly acknowledge that there are many

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different rates of interest in the market and that these rate differentials reflect different degrees of risk, different maturities, loans of different size; in other words, realistically, there is not a single market; there are a number of markets.

So that the overall market for funds is, in effect, a segmented market.

Q. All right; would you state whether or not, in your opinion, uh, that one hundred per cent land acquisition and development loans of the nature appearing in the loan agreement, Plaintiff's Exhibit No. 5, uh, constitute a segment of the credit market?

A. In my opinion, it is a segment.

Q. All right, sir. Now, Dr. Masten, if at a given period of time, uh, you have a lender who is the only lender making loans within a segment of the credit market, does that lender have, uh, economic power within that segment of the market?

A. If he is the only lender making loans under those specific terms, I would say the answer is yes.

Q. All right, sir. Doctor, referring you to the Credit Corporation's Financial Statements, roughly for 1960, I believe they show that the Credit Corporation made a profit of approximately $52,000 and, uh, that in 1961, the

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Credit Corporation made a profit of approximately $59,000. Now, uh, is there any significance in that profit, or that level

of profit, in relationship, uh, to the amount of the loans, uh, which the Credit Corporation had outstanding during those two years?

A. Well, I would have to compare the profit made by a credit corporation with some kind of a benchmark figure. So, I related the profit made by Credit Corporation to the profit earned by all insured, commercial banks during 1960 and '61. I think, now, it is important to keep in mind that Credit Corporation did not have to maintain any legal reserves or cash assets; it did not have to maintain liquidity in the form of government securities so that theoretically, at least, it had an opportunity to earn more than the average commercial bank, yet I found in 1960, that the return on assets for credit corporation was point three four and for all insured commercial banks it was point eight one.

The return on capital for a credit corporation was four point four; for all insured commercial banks, ten point three. For the year 1961, credit corporation earned point four one return on assets as compared to point seven nine by insured commercial banks. Credit corporation earned four point eight on capital as compared to nine point

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three seven for a commercial bank, so generalizing, credit corporation was only about half as profitable as the average commercial bank.

Q. All right; I'll ask you to, if you would, Doctor, if you could find those financial statements there, (indicating).

(Whereupon, the witness did as requested.)

Q. And this one, I call you attention to, Doctor, I believe it is to the 1962 statements.

A. '62?

Q. Yes, sir; that should be the second one there.

A. We have '60 and '61 here yes, I have found '62.

Q. All right, sir. I would like to refer you to the notes

to the statement, Doctor, which are on one of the pages; yes, would you read those notes? They are very brief.

A. These are notes to financial statements for the year 1961 and for the year 1962.

"At December 31, 1962, the corporation had commitments to purchase mortgages or to make additional loans up to approximately thirty one million dollars. The

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Corporation's parent company has agreed that upon request, it will purchase an additional ninety thousand shares of the corporation's capital stock at par and lend the Corporation an additional twenty-six million, such loan to be subordinated to bank loans."

Q. All right, sir. Doctor, uh, I ask you to assume that the United States Steel Corporation had already bought one million dollars worth of stock of the Credit Corporation and that the ninety thousand shares referred to in that note represent par of a hundred dollars per share, which the record shows, uh, and which would be an additional nine million dollars.

Now, is that significant, in your opinion, Doctor, insofar as the relationship between United States Steel Corporation, uh, and the Credit Corporation is concerned in connection with the Credit Corporation's standing in the financial community?

A. Very definitely; it indicates that Credit Corporation was although relatively small, nevertheless, it was an operating vehicle for the United States Steel Corporation.

Q. And what—what do you—could you elab-

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orate on that, sir, uh, as an operating vehicle, what is the significance then of that statement?

A. Well, as an operating vehicle, it was operating in a

specific area, namely, the granting of loans for the purchase and construction of the United States Steel Homes. Now, I have indicated that compared to the size of the United States Steel Corporation this is a very small activity.

I, frankly, would not know why they decided to set up a separate subsidiary, as opposed to doing it directly as a part of the corporation, but I think that the same objective was accomplished.

Q. Well, uh, let me ask you this, sir; of the one million dollars of capital stock which the United States Steel Corporation had already purchased of the Credit Corporation, uh, do those financial statements show, uh, that the Credit Corporation was, uh, paying, first of all, United States Steel any dividends?

A. No, I do not believe they paid any dividends in this period that is in question.

Q. Would, uh, did, during this period covered by these financial statements, did the Credit Corporation, uh, pay to United States Steel Corporation any type of, uh, return on that million dollars that U. S. Steel put into it?

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A. I find no record of any payment.

Q. Now, sir, if instead of borrowing money from banks, uh, the Credit Corporation had, uh, as it was authorized to do, uh, had had U. S. Steel Corporation buy the additional nine million dollars worth of capital stock, would that nine million dollars have been available to the Credit Corporation to lend out?

A. I assume that it would. I do not see any way in which it would have been encumbered. It probably would have increased Credit Corporation's ability to borrow because basically, Credit Corporation is a very small enterprise, and if it were independent, had no relationship whatsoever to United States Steel, its ability to borrow would

have been greatly weakened; it would not have had the position in its relationship with banks, borrowing, that it had by reason of United States Steel's ownership and, uh, guarantee.

Q. Well, in your opinion, uh, if the Credit Corporation had been an independent financing institution, uh, would it have been able to borrow money from banks at the prime rate?

A. In my opinion it would have been substantially below the requirements for prime classification.

Q. All right; if the credit standing of United

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States Steel Corporation had not been available to the Credit Corporation in its borrowings from banks, Dr. Masten, would you tell us from your general experience, whether or not banks would look at the nature of loans that a lending institution is making in considering loans to be made to that lending institution as a borrower of the bank?

A. I think certainly that many banks would. Remember that we are talking about loans being different. You would have to consider that individual banks have different standards. We have seen that recently in the case of the U. S. National Bank in San Diego, but generally, they would look at the profitability of the corporation; they would look at the trend in earnings, and this is not a particularly profitable operation in terms of its own right.

We have indicated earlier that its earnings were approximately half the earnings of the average commercial bank. Now, a lender is going to be concerned with various factors. He is going to be concerned with the character of the people who run the business; he's going to be concerned with the capital in the business; he's going to be concerned with what collateral—now, if he's going to use loans made by Credit Corporation as collateral for a bank

loan to a credit corporation such as this, then he would be concerned with the quality of that collateral,

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but he's going to be concerned particularly with the capacity of the borrower to repay the loan and I think he would look at earnings and that would be the first thing I—that I think he would look at if he's going to use these loans receivable as collateral and then he certainly would look at the quality of the loans.

Q. Dr. Masten, uh, looking at the, uh, financial statement of United States Steel Corporation, uh, did it have funds readily available, uh, to advance to the Credit Corporation, if required, during the periods of time obviously covered by that financial statement, which I believe is in 1960 and '61?

A. Well, the annual report shows that United States Steel, in 1960, had four hundred fifty-one point seven million dollars in cash and securities. In 1961, it had six hundred forty-two point two million in cash and securities.

I don't know the distribution between the cash and securities, but I assume that at least a substantial portion of these securities would have been easily convertible into cash so that it could have made a sum of money comparable to what the Credit Corporation is using readily available. Certainly they had the financial sources to have made the funds directly available to Credit Corporation

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had they chosen to do so.

Q. All right, sir. Dr. Masten, based on your analysis of this matter, including your reference to the documents which we have referred, and making the same assumptions that we have previously made, do you have an opinion, sir, as to whether or not the Credit Corporation during the period of time that we are talking about, 1959, through

1961, had any leverage in the so-called credit market or any portion or segment of the credit market?

A. Well, I think it had definite leverage in a segment of the credit market; the segment related to the land acquisition and development. Now, here again, I think you have to look at—the market has two sides.

There is the side where the Credit Corporation is a borrower, or United States Steel is a borrower. I would not intend that United States Steel had an advantage over American Telephone & Telegraph, or AT&T, or General Motors, or any large, prime corporation, as a borrower of funds.

The leverage that was used, uh, utilized, was on the other side of the credit market where United States Steel and its subsidiary has, being a lender of funds that have been acquired either by the sale of product or by borrowing the funds and I believe that it did have leverage

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in this particular area because of the uniqueness of the terms of the loan.

Q. And from your analysis, did they exercise that leverage?

A. Well, taking the agreements that I have seen and assuming they are valid, they exercised it, yes. I mean, we have written documents indicating that this is what they did. They made credit available on a very favorable basis. I think that I may have expressed to you that it was in a sense, like giving candy to a baby.

How can you refuse a hundred per cent loan where you, as the borrower, put up absolutely no equity? How can you turn it down? So that, uh, by the terms of the loan, they exercised leverage.

Mr. Anderson: All right, sir. That is all we have, Your Honor.

By the Court: Yes; we've been going about an hour; let's take ten minutes before cross-examination; is that all right?

Mr. Reutlinger: Yes, sir.

(Whereupon, at about the hour of 10:27 A. M., a short recess was had after which the following proceedings occurred:)

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By the Court: All right, gentlemen.

Cross-examination

By Mr. Reutlinger:

Q. All right, Dr. Masten; do you have before you a copy of the Plaintiff's Answer to our Interrogatories which were filed, I believe, last January?

Mr. Anderson: Obviously he doesn't, Mr. Reutlinger.

Mr. Reutlinger: Well, let me give him a copy (doing so at this point.)

Q. If you look on page two, Dr. Masten, I think you will see in quotes what would—may I give a copy to the Court? Page Two, you will see the notation that would appear to be a summary of your report. Do you recognize that as such?

A. I recognize everything but the spelling of my name, sir.

Q. Well now, Mr. Anderson prepared that so you better fuss at him.

(General laughter at this point.)

Mr. Anderson: He has been for the last two days.

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Q. I see. Dr. Masten, are you aware that Mr. Anderson wrote me a letter dated November 9, 1973, concerning additional testimony which you may offer today?

A. No.

Mr. Anderson: I don't think I told him about the letter.

Q. Well, I would like to give you, then, a copy of that letter, and Judge, the only other copy I have has my scratchings on it.

By the Court: All right.

Mr. Reutlinger: And that might not be appropriate.

By the Court: Yes; well, Mr. Anderson wouldn't want me to see that.

Q. You may have those, Dr. Masten; there is no reason to pursue them at this point.

A. All right.

Q. But we may get into it. Looking at the Interrogatories which is the larger of the documents, did you, in fact, prepare the statement that is in quotations on that document?

A. This portion (indicating), yes.

Q. It is all indented and in quotations.

A. Yes; it looks as though this is entirely my

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statement.

Q. All right, sir. If you would, and I will ask you to take up the copy of that letter and read it; it's very brief, and then I'll ask you a question concerning it.

(Thereupon, the witness did as requested.)

A. I think I've read it rather hurriedly.

Q. All right does that, materially, reflect conversations or reports made to Mr. Anderson earlier?

A. Yes, Mr. Anderson visited me in Athens and we had a discussion of this.

Q. Along those lines?

A. Along these lines, correct.

Q. Dr. Masten, you used the word "unique" many times in your testimony. Could you define that for me, both generally, and as used in the context of your testimony, if there's a difference?

A. Well, may I say that I—if we are dealing with loans,

each loan has characteristics which tend to differentiate it from another loan. If you want a homogeneous market, let's talk about government securities, three month treasury bills, where there are maybe five million outstanding and we feel they are quite homogeneous, but the moment you move to nine month, or five year or twenty year

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treasury securities, there is an element of difference; there is an element of uniqueness.

Now, a loan, to a very strong corporation, would have characteristics that would be different from a loan to a corporation that is, in a sense, new and untried, so I would concede that there is an element of differentiation from one loan to another even in terms of risk, in terms of maturity, in terms of the terms that had been given by the lender.

Now, this—uh, this loan as I used "unique" here, if you had the concept of a normal distribution of loans, and here in the middle of that distribution is a loan that might be characteristic, uh, be characterized as an average loan, and don't, please, ask me to define it.

Q. I know.

A. I'm just trying to give you a hypothetical concept here. Well, this loan is unique in that it would not possess the characteristics of an average type of loan.

Q. Well, you've told me that all loans are not the same.

A. That is correct.

Q. So, in a sense, each loan is unique, isn't it?

A. Each—each loan has characteristics that

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differentiate from other loans; it's a matter of degree.

Q. I realize that.

A. All right.

Q. Now, let's talk about land development loans which is what we are concerned with. Would the lender look at

the cost of the acquisition or would he look at the value of the land in deciding the percentage of security or tie—

A. If it were a bank or a savings and loan association it would be governed by the legal restrictions applicable at the time as to the percentage of loan it could make against the property.

Q. Well, let's assume that it were not a regulated lender and let's assume it was a mortgage broker or National Homes Acceptance Corporation, or anyone generally unrestricted. Would that type of lender look to the cost of the land in determining what percentage it would require as security, or the—or to the value of the land, and I am making here a distinction between cost and value.

A. I appreciate your distinction. I am not sure that under all circumstances there would be a distinction between costs and value.

Q. Let's assume that there is, in fact, a distinction between costs and value in the hypothetical

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question I am giving you.

A. Would you care to elaborate as to how this distinction might have come about?

Q. It is possible that the purchase of the land could come from a controlled seller, or that the seller and purchaser were inter-related so, of necessity, it would not be an arms' length transaction and costs and value need not be the same.

A. I would concede that this would be possible; in other words, if you are buying the land from your uncle, hypothetically, okay.

Q. Well, not particularly my uncle; perhaps my mother.

A. All right.

Q. But I follow your point; the lender being a third party, of course, totally unrelated. Now, in that context,

would the lender look to costs or would he look to value; perhaps my uncle overpriced it.

A. If there is a difference between cost and value you would concede that he would look at the value. He would probably want an independent appraisor.

Q. You would surely want some indication of what the true value was?

A. Yes.

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Q. Now, when an independent lender values a particular piece of property on which it proposes to lend money and how much the property will stand as security, what elements or factors would such a lender consider?

A. Well, I—I think he would be concerned with the prospect for appreciation in the value. I believe, as a part of my earlier testimony, I indicated that this was a period when prices were very stable as contrasted let us say, with the last three or four years when prices have been rising. Over time, there has been a tendency to liberalize lending conditions in anticipation of inflation of property so he would certainly want to know something about the, uh, what is likely to happen to property values; is this a period of inflation, or is there something particular about this area that gives it characteristics or qualities that are different?

Q. What other factors, if any, would you believe a lender would consider in making the loan?

A. I believe the lender would consider the net worth of the borrower. If you want to use basic principles of lending, character, capacity, capitol and collateral. Now, I would be glad to elaborate on any one of those.

Q. No, no; I'm familiar with those terms.

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A. But these are—

Q. (Interrupting) Would he perhaps consider the prospect of the general economy?

A. Yes.

Q. Which is another element than those four you mentioned?

A. Yes, this would influence capacity to repay.

Q. Yes, it could. All right; I can see that that's a subelement of that. Would he perhaps consider the ability of the borrower to perform whatever task the money was to be utilized with?

A. Yes, sir.

Q. That's against capacity?

A. Right.

Q. You've told me that, uh, in broad outline, four elements which can be subdivided?

A. Right, yes.

Q. In certain respects?

A. (Witness nodded head affirmatively.)

Q. Let's find out what would happen if you had a borrower who owned the subdivision which was, in part, and a substantial part developed, successfully, and wanted to

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borrow money on adjacent land to be part of the overall project. Would a lender be more inclined to be perhaps liberal with that borrower than if the project had not been under way, or he started out cold?

A. You are establishing a situation where there is—

Q. (Interrupting) In existence.

A. (Continuing)—in existence a piece of property which is partially developed?

Q. Successfully.

A. Successfully.

Q. Yes.

A. And it is a question of developing the balance of the property?

Q. Yes.

A. Are the homes comparable?

Q. Yes.

Mr. Anderson: We would dispute that.

Mr. Reutlinger: Well, let's let the witness answer.

A. Uh, this might be a factor.

Q. Well, and what would the factor tend to do to the lender; make him more liberal or more strict?

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A. It might make him more wililng to assume greater risk.

Q. Now, in each case, and I think you have answered this, but I want to make sure; wouldn't an individual independent lender make his own evaluation of the factors we have discussed, both present and prospective, in reaching a decision to lend money?

A. Each lender would have his own credit standards, if that is what you are asking, yes.

Q. Well, I—yes, and I think that is a correct answer and a sensible answer. Wouldn't it follow then that each lender, with different ends in view, might reach different conclusions on the same identical existing set of facts and reasonably anticipated known projections?

A. Well, if you had left out "end in view" it would have been easier to have answered your question.

Q. Well, doesn't each lender have, perhaps, different motives?

A. Well, I—I think that a lender whose primary business is lending, makes credit available in the anticipation that he will be repaid and will also receive interest, and I—and that would be—I would say that lenders that have that as their objective would review the same circumstances as individual lenders. They may have

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different degrees of preference for a risk aversion.

Q. Well, even then, in that same limited category you are telling me that in an identical situation lenders in an identical category could reach different results; some may make the loan, some may not?

A. That is possible.

Q. Would you go probable, Dr. Masten? Do you—

A. (Interrupting) Now, I'm going to call upon my experience.

Q. All right.

A. In working with cases, as I use cases in workshops, as I send out cases to over a hundred students doing case work each year. I send out cases that are so obvious that either all will make the loan or all will reject it.

That is not the kind of case I like to send out. I like to send one out where some will and some wouldn't; then, we have a basis for discussion.

Q. Uh huh.

A. But, uh, if you would go through the cases as they come in to me, because I have to decide which cases I'm going to select, on some I will write at the top "too obvious". In other words, it is so obviously good, or so

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obviously bad that, in a sense, it is no contest.

I prefer the cases where I think some might make it and some might not make it.

Q. Let me interrupt and I do understand your answer; are these cases contrived, or are they—

A. (Interrupting) They are actually drawn from bank files.

Q. From bank files.

A. Yes, and I usually know, incidentially, what decision the bank reached, but I do not reveal that decision when I use it as a discussion case.

Q. Generally speaking, however, aren't those cases that you mention at each end of the spectrum, out of the norm?

A. Yes, they are out of the norm.

Q. All right. Now, I believe you told us earlier that loans equal to a hundred per cent are considered high risks since the borrower has no direct financial stake in the project?

A. Yes.

Q. Aren't there cases in which the borower after making such a loan for land acquisition and development, and other matters, would then become so involved in the project that he would have something at stake, or a risk

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in the project?

A. He has at stake potential income. He does not have at stake anything that he alread has.

Q. Well, isn't—let's presume, and I think this is a motive of business, let's presume he did the whole thing for profit. Isn't that what he has at stake, among other things?

A. Yes, obviously, in my understanding of the situation in this case, if this had developed in the normal manner, then over time, as these units were constructed, if they were successfully sold, a profit would have accrued to the developer and in that sense, he had a potential future stake which would have grown with the progress.

Q. Could—could he have a stake in the project at its inception if he only borrowed to acquire the land at cost?

A. He borrows one hundred per cent; is that your question?

Q. One hundred per cent of the cost.

A. He doesn't have anything specifically at stake at that moment of time except hope. He's obviously hoping to make a profit and there is nothing—

Q. (Interrupting) Now, remember, my question

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was cost of acquiring the land.

A. Well, in—in a purely hypothetical assumption, if you assume the cost and the value are different, then that might be true.

Q. You say a purely hypothetical assumption. Could that exist in real life?

A. That could, but if I may say, I do not recall anywhere in any of the testimony that I have read where this was established previously.

Q. This is our responsibility, Dr. Masten, but that is all right with your comment. Isn't it true that a hundred per cent land loan is higher risk than a lower percentage loan only because the risk of the lender's recovering the full amount of that loan is greater in the event of a default?

A. Are you—may I ask, uh, state your assumption as I think you are putting it?

Q. Yes; yes, I wish you would.

A. You are assuming that here is a loan, (A), a hundred per cent loan; here is loan (B), which is, let us say, a seventy-five per cent loan.

Q. All right.

A. But it carries a lower rate of interest.

Q. Yes.

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A. Now, if the credit standing of "A" and "B" are equal then the potential loss is greater on Loan "A".

Q. Yes.

A. The hundred percent loan.

Q. Did you tell us that a prudent lender would never make the hundred per cent land acquisition loan?

A. I didn't—I don't recall that I said never. I can visualize, in 1972, that loans of that character would not have been uncommon. In fact, that would not have been

an uncommon type of loan in the last five or six years because we have had an annual rate of inflation that has carried values upward, so I think what is prudent at one time may not be prudent at another time.

My comment with regard to the loan at the time was that there was no reason to anticipate rapid appreciation of land, certainly during the term of the note, because this was a period of extreme price stability. We haven't had any price stability comparable to that since that period and if it is of interest, I have a chart from the Federal Reserve that shows this period. I can introduce it if you care to have it.

Q. Well, I think we can accept your conclusion for the moment.

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A. All right; but it is a stability that carries to about 1965.

Q. Do you know of any lenders other than the Credit Corporation who ever made a hundred per cent land loans?

Mr. Anderson: If the Court please; are we still—he uses the term "ever." Now, are we going to talk about 1973, or talk about what this lawsuit is about?

Mr. Reutlinger: All right; I think that's a good observation—valid observation.

Q. Let's first restrict the question to the time of 1959 to 1961, and then I'll ask you another one.

A. I am unaware of any loans of that character being made at that time.

Q. All right. Now, is this both in the Louisville area and anywhere else in the country?

A. I'm talking about, uh, the area that I had any reason to have contact with people who were in a lending capacity.

Q. Did you tell us on direct examination that that was in the Louisville and Kentucky area?

A. Well, I think that the questioning at that time was related to this area.

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Q. All right, sir. Now, let me ask you, in essence, the same question, say the period from 1962 to 1968; do you know of any persons lending a hundred per cent land acquisition loans in the general Louisville area?

Mr. Anderson: We object, for the record, to the question, Your Honor, since it does not involve the period of time covered by this litigation.

Mr. Reutlinger: I'd like his answer in by avowal, if the objection is—

By the Court: (Interrupting) That's all right; I'll overrule it. Let him go ahead and answer; Uh, I understand the period.

A. Well, I will answer it by saying that recently—now, whether it would fit into the time period that you are suggesting—

Q. Yes.

A. I have heard of hundred per cent loans, but most of the loans that I have heard of about this character have been more recent.

Q. I realize you prefaced your remarks with you were uncertain of the time.

A. Yes, because you picked a specific, and what I'm trying to say, in essence, is this, and this is why I think my table that shows what was happening to the

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wholesale price index is pertinent; at about 1965-'66, we began to get a rapid acceleration in wholesale prices. In other words, inflation became much more severe.

Q. Well, and let me interrupt; I'm seeking a time, and are you telling me that your impression, or recollection is of loans made after 1965?

A. Yes.

Q. All right; has any lender ever told you why he would not make hundred percent loans—hundred per cent land loans?

A. Most of my dealings are with bankers and they simply are prohibited by law from making loans of a hundred per cent.

Q. Well, there are, of course, by inference, others who are not prohibited by law from doing it.

A. That is true, yes; there would be pension funds and insurance funds.

Q. Who are not prohibited?

A. Yes.

Q. Have any of those people ever told you why they would not make hundred per cent land loans?

A. I—

Q. Or maybe they had made 'em.

A. No. Are you talking about that period or

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are you talking about—

Q. (Interrupting) Let's talk about that period and then subsequent—both; again, a double question. I'm sorry to—

A. Well, I am not aware of being told that they would or would not. From my knowledge of operating procedures of lenders at that time, a hundred per cent loans were frowned upon.

Now, if I may move to a more recent time period, if that is also part of your question, this has become more popular, but there has also been a vast change on the institutional structure of financing. You have had a new lender because increasingly important in the last five or six years, the Real Estate Investment Trust, and they are much more aggressive in their lending policies and their policies have

been influenced by the fact that land values have been appreciating.

Q. Did you tell us that prudent lenders would not make a hundred per cent land loans, particularly during the period of time when the price level is stable and an inflationary appreciation of value is not indicated?

A. Yes.

Q. And I gather you did that. Would it follow then that when price levels are likely to be inflationary

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or you could expect appreciation that such loans would be more likely to be made, even by prudent lenders?

A. In a period of inflation, loans carrying a greater risk are more likely to be made. If I can assume that a hundred per cent loan is a loan carrying a greater risk, then they are more likely to be made.

Q. All right; and by prudent lender, of course, a prudent lender is like an ordinary prudent man?

A. That's right; that's right.

Q. Would you go some?

A. You really never know that you haven't been prudent; as a banker would say, "We never make a bad loan; it just turns out that way."

Q. I understand.

A. All right; there are degrees of prudence also.

Q. I realize that.

A. Uh, the more rapid the rate of inflation, the greater the likelihood that the loan would be made under increasing risk assumption conditions.

Q. Which, of course, if passed on to the ultimate, means a hundred per cent land loan?

A. They might become more common.

Q. All right.

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A. Where permitted. By regulations, they wouldn't

have been more common in banking or in savings and loan associations.

Q. I understand about banks. I am not speaking about the others now.

A. All right.

Q. So, it would follow then, I gather, that the determination of whether or not to make a hundred per cent land loan or any substantial certain portion of the loan would be, or in some measure relate to what would happen to the economic forces after the loan commitment was made?

A. I would think that any lender would try to make some estimate of what he anticipated would happen to the economy.

Q. Everybody tries to look ahead, don't they?

A. And—and does very poorly.

Q. Well, you've been to the horse races too then, haven't you?

A. I just two weeks ago was at the Hippodromo DeLaRanconda Race track in Caracas, Venezuela. I attended three races; I quit.

Q. You're a very wise man. You have discussed the price stability, based on the wholesale price index. Now, why do you tell us that that is the best measure of

real estate values during the time in question?

A. Well, the reason I tell you is because building materials would be included in the wholesale price index. The retail price index would include rent, but it would also include doctors, beauticians, dentists, household operations, uh—

Q. Well, now, building materials have nothing to do with real estate values, raw land, do they?

A. Not with raw land. They might have an indirect relationship.

Q. Well, I'm speaking now of land.

Mr. Anderson: You are misrepresenting the testimony, Mr. Reutlinger, and I object to it.

Mr. Reutlinger: I thought that was what he said.

Mr. Anderson: That's not what he said. He used the wholesale price index and there it was stable.

The Witness: Yes, I used the wholesale price index as an indication of price stability.

Q. That's right.

A. And to me, that seemed to be the most applicable. We have, after all, only two basic texts that we can use.

Q. I understand.

A. We can use the consumer price index or the wholesale price index.

Q. I understand.

A. Having worked with the Bureau of Labor Statistics for approximately three years, I'm well aware of the fact that the consumer price index includes a number of services.

Q. Well, I—

A. (Interrupting) Which are not included in the wholesale price index.

Q. Well, my question was, and I think you answered it, but if you want to elaborate on it—

A. All right.

Q. What, in the wholesale price index, leads you to believe that that is an accurate indicator of real estate values, and you mentioned that it contained, uh, building materials.

A. Well, it is more general indicator of basic prices in primary markets.

Q. All right.

A. As opposed to retail markets.

Q. Now, the index you used, was that an annual or monthly index?

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A. I used the monthly. It would make really very little difference because the annual is compiled by taking an average of the monthly indexes.

Q. Obviously. When are the monthly figures available after the end of any given calender month, and again, that would have to be—

A. (Interrupting) Well, I can't tell you precisely when, but when I worked in the Bureau of Labor Statistics there was a lag of from twenty to twenty-five days and whether that has become computerized, uh, it's probably a month and a half.

Q. You mean it slowed 'em down?

A. (Witness nodded head affirmatively.)

Q. All right. Do you have a copy that you used, and do you have an extra copy?

A. Well, I have, uh, I have drawn the red lines to indicate the period that I—

Q. Yes, sir.

A. (Continuing) —was taking into consideration.

Q. You have no doubt that this is an accurate—uh, I'm not questioning the authenticity of it, but this is a publication by the Federal Reserve System?

A. Yes.

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Q. But you are satisfied with the authenticity of the reproduction from the statistics themselves which you have in your hands?

A. Well, we can—

Q. (Interrupting) Well, no, I say are you satisfied?

A. I am satisfied.

Q. All right.

A. Here, if you want it I can give you the all-commodity index for 1960, was ninety-four point nine; for 1961, ninety-four point five; for 1962, ninety-four point eight;

for 1963, ninety-four point five; for 1964, ninety-four point seven.

In 1965 it begins to go up; it's ninety-six point six; in 1966, it's ninety-nine point eight; in '67, which happens to be a base year, a hundred. I do not have the most recent figure here.

Q. Well, you are going— you've gone a 'way beyond us anyhow.

A. All right.

Q. Thank you.

A. I'm just trying to show you.

Q. Yes, sir.

A. That that's the time span; that prices

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really didn't begin to move upward until '66.

Q. All commodities on this chart are the heavy, black—

A. Yes, that's the—that is the composite.

Q. Do you have an extra copy of this?

A. I do not; fact, I received that—

Q. Yes.

A. (Continuing) —Wednesday, I believe.

Q. Yes.

Mr. Reutlinger: Can we identify it, uh, Mr. Anderson, as Historical Chart Book, published by the Board of Governors of the Federal Reserve System, 1973?

Q. That is this publication?

A. Yes, that is it. Now—

Q. Go ahead, sir.

A. The Federal Reserve is a secondary source.

Q. I understand.

A. The primary source is the U. S. Department of Labor, Bureau of Labor Statistics.

Q. But you said you were happy with the way they did the work?

A. I'm happy; they did a good job.

Mr. Reutlinger: What we'd like to

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do is, of course, not take Dr. Masten's book away from him, but would want leave to introduce, as a part of his testimony, another copy of this which I assume we can obtain.

The Witness: It could be obtained from the Federal Reserve, yes.

Mr. Reutlinger: As Defendant's Exhibit No. 500.

(Whereupon, a Document, a Historical Chart Book by the Board of Governors, Federal Reserve System, Was Marked for Identification as Defendants' Exhibit No. 500.)

Q. Doctor, you do have the source material there, and is this, in this point of time, the source material on all commodities; uh, appears to be from page 250?

A. Yes.

Mr. Reutlinger: I'd like that to be introduced as Defendant's Exhibit No. 501.

(Whereupon, a Three Page Document Entitled Consumer Price Index, U. S. Department of Labor, Was Marked for Identification as Defendants' Exhibit No. 501.)

Q. Now, you have the exhibit before you, Doctor; are the figures given in all commodities the same

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figures used to prepare the graphic illustration or chart found in the earlier book for the Federal Reserve?

A. Yes.

Q. Now, looking at that, you will notice where the all commodities index between 1949 and 1952 reflects an extraordinary kind of a big jump. Would that be the impact of the Korean War, in your opinion?

A. Yes.

Q. Now, from 1953 to 1960, using that Exhibit No. 501, the all commodities index increased each year without exception, didn't it?

A. Yes.

Q. You have told us that in 1959 to 1961 there was a period of price stability, using the wholesale price index as your guide. Would it be your testimony that during this period business had slacked off or was less vigorously prosectued than in the four or five preceding years?

A. Yes, there is ordinarily a relationship between prices and economic activity.

Q. All right. Now, do you know whether that was true in the Louisville area or not?

A. I cannot say—I cannot site the specific indicators of the Louisville area.

Q. The wholesale price index and the commod-

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ities index are national averages, aren't they?

A. They are, because it's data reflected on a national basis.

Q. Could there be a variation in the trend of any single commodity used in the national indices over any given period of time?

A. May I ask the question in a different terminology and see if I understand you correctly?

Q. Sure, sure; yeah.

A. I do not know specifically the number of products priced in the wholesale price index, but it must be well over a thousand; it's considerable over a thousand; I know it's over a thousand.

Q. You're right.

A. Now, is it—you're asking me is it possible for one of those one thousand plus items to move contrary to the trend and the answer is yes.

Q. Of course.

A. In fact, over a period of time, we had chemicals declining because of technological development. This is the reason why I was using the wholesale price index merely as an indicator because I know of no better indicator.

Q. Now, you've already told us why you

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selected the wholesale price index as the basis of one of your conclusions and you have told us one commodity, by name, included in that index. Can you, either in broad outline, give us the categories of commodities, or which I concede is a difficult or almost impossible task, like the some two thousand five hundred commodities?

A. Well, I—agricultural products, textiles, chemicals, metals, machinery, sub-category, electrical machinery, fuels, hides, skins.

Q. All right.

A. Various sub-categories of foods and farm products.

Q. All right; that's all right. Now, I think you have answered this and I will restate your answer as nearly as I recall it and correct me if I am mistaken, but the only commodity that you mentioned in the wholesale price index which would correspond to the price movement of land for development into residential subdivisions in Louisville was building materials. Are there any others?

A. Plumbing, heating.

Q. Wouldn't that be a building material in broad category?

A. In broad category, it would.

Q. Yes.

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A. Uh, I—well, offhand, I cannot think of a category that—uh, other than building materials and I am perfectly willing to say that I don't even think the building materials

would necessarily be very important because I was looking for an indicator of what was happening to the economy. We have no land value index that I am aware of.

Q. In the wholesale price index?

A. There is none in the wholesale price index. When I was with the Bureau of Labor Statistics in Chicago in World War II I constructed a land index for the City of Chicago and at that time there was no such index. Oh, I take it back; there was one in Washington, D. C., based upon appraisals.

None of those were continued because we doubted the accuracy of this kind of evaluation and I have never seen one since that date.

Q. Does a wholesale price index have some warnings in it, uh, caveats, concerning seasons, or other—

A. No, it is deseasonalized.

Q. What, sir?

A. It is deseasonalized.

Q. It is deseasonalized.

A. You can get it either way.

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Q. Get it either way; can you get some of each?

A. You can get, ordinarily, some of each with seasonal variations or without seasonal variations. Most of the data that is used would be deseasonalized. That is true, I think, on most time series.

Q. You have talked about the prudent man. Would you, as a prudent businessman, base any judgment or conclusion on maybe two or three months reports as an indication of a trend in the wholesale price index?

A. Uh, why do we have to constrain it to two or three months?

Q. Well, that is my question.

A. No, I would say on two or three months, but—

Q. Well, my question is would you do it using only two or three months as the trend or indicating trend?

A. Two or three months movement would probably cause me to watch more closely if it showed an appreciable change.

Q. But would you, as a prudent man, base a decision on a few months reports only?

A. In terms—you're going to have to define; if I were concerned with money market costs, three months

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of what is happening to the Federal Reserve position of the market would be very significant.

Q. Let me put it all commodities index which is the one we were discussing.

A. I really cannot answer you except it would depend upon what kind of business I was in, how sensitive it was to economic change. I might or I might not be concerned with three months. I think if I had three months of rapid increase such as we had in the middle of summer, as a prudent man or even as a politican, I would be concerned.

Q. Now, you obviously have heard of the consumer price index?

A. Yes.

Q. Which is also published by the Bureau—

A. (Interrupting) Right.

Q. (Continuing) —of Labor, uh, I can't say it, uh, Statistics.

A. Statistics.

Q. Which is a very difficult word for me to pronounce. You feel that index is of equal dignity and is prepared with as much care as the wholesale price index?

A. It's easier to collect wholesale prices. I don't know whether that is any factor of importance.

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Q. Well, do you feel that depending upon what your

goal is, that the consumer price index is generally accorded the same weight as the wholesale price index?

A. For what purpose?

Q. I said depending upon your purpose, would you give one or the other, or both, the same weight, or perhaps consider them both?

A. If I were an emplyoee working for a corporation and they had an escalator clause in their wage contract—

Q. (Interrupting) I understand that.

A. (Continuing) —I'd want the consumer price index. If I were an apartment developer, or if I had an apartment house that I was renting, I would probably want an escalation clause based on the wholesale price index. If I were selling coal to a public utility, and I know that when I was in the Bureau of Labor Statistics Office, Chicago Office, that this was true, coal price was geared to changes in the wholesale price index, so I think it would depend upon your purpose.

Q. Well, that is what I said.

A. Yes.

Q. That was my original question; depending upon your purpose—

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A. (Interrupting) All right.

Q. Would you give—would you believe that is as accurate and as carefully compiled as the wholesale price index, and I'm speaking now of the consumer price index and they are both published by the Bureau of Labor Statistics, aren't they?

A. By the Bureau of Labor Statistics. I am aware of how the information is compiled and weighted and I gave you one answer saying that it is easier to collect wholesale prices than it is consumer prices.

Q. I am aware of that answer.

A. But I would still contend generally they are com-

petent. For some unknown reason we do not have anything available which is compiled with greater competence.

Q. All right; that's in both cases?

A. In both cases.

Q. Yes; then the consumer price index is based on prices paid by urban wage earners and clerical workers?

A. Yes.

Q. Now, the consumer price index has a commodity grouping covering housing, doesn't it?

A. Based on rentals.

Q. And does that housing grouping include a separately reported category covering home ownership?

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A. The cost of home ownership, yes.

Q. Well, wouldn't part of the cost of the home ownership be acquiring?

A. Be what?

Q. Acquiring the home.

A. Interest cost.

Q. And isn't it true that the housing grouping and the home ownership price in the consumer price index for 1953 through 1961 increased each year without interruption?

A. I do not have the figures in front of me. I don't believe you made that available to me.

Q. All right; did you consult those?

A. Yes.

Q. Well, this is not a memory test.

A. Yes.

Q. I mean did you consult those figures?

A. Yes, I did.

Q. When you reached your, or made your report, uh, I show you what I'd like to introduce as Defendant's Exhibit No. 503, and ask if this is an excerpt from the commodities prices, consumer prices as indicated on the face of the document?

Mr. Anderson: Excuse me, Mr.

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Reutlinger; you gave me a whole stack of what looks like the same thing.

Mr. Reutlinger: Well, one may be for Scotty.

Mr. Anderson: There are eight or ten here.

Mr. Reutlinger: How many; eight or ten; maybe they are not clipped together. Wait a minute; I've got one for Scotty.

Mr. Anderson: Have you got the footnotes?

Mr. Reutlinger: Whatever is there is the picture made.

Q. Does that appear to be a xerox copy of what you have?

A. Yes.

Mr. Reutlinger: I'd like it to be introduced, if Your Honor please, as an exhibit.

By the Court: Let it be filed.

(Whereupon, a Document Entitled Consumer Price Index, Services, Total, Etc., Was Marked for Identification as Defendants' Exhibit No. 502.)

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Q. Doesn't the housing grouping and the home ownership price on the document you have show an increase from 1953 through 1961 without interruption?

A. The home ownership grouped under shelter.

Q. The housing and home ownership both; if there is a separate, I don't—

A. There is a total; then there is a rent; there is a home ownership, another total, fuel and utilities, gas and electricity, household furnishings.

Q. And home ownership under the broad heading of shelter, isn't it?

A. There is a home ownership one, yes.

Q. Did that go up without interruption for the period I mentioned, which was 1953 through '61?

A. It went up, yes.

Q. Without interruption; no variation?

A. Without interruption.

Q. All—every year, up?

A. I do not see the footnote that indicates what was included in that.

Q. That wasn't my question.

A. Home ownership.

Mr. Anderson: If the Court please.

Mr. Reutlinger: Well, I mean, he

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can—

Mr. Anderson: Let's be fair about it; I asked a minute ago for the footnotes.

By the Court: All right; you all quit arguing; let's go ahead.

Q. And wasn't the acceleration or risk greater after 1957 through 1960 than earlier in the period I have mentioned?

A. All right; your first period is what?

Q. 1953 through 1957, and then after that, wasn't—

A. (Interrupting) From the ninety, point one to apparently ninety-eight point two, or a rise of eight point one, or over nine per cent.

Q. How would the curve go after 1957 to 1960? Would it be sharply—more sharply upward?

A. From ninety-eight point two, to one hundred three point seven.

Q. See, that's only three years.

A. So, we have five points over that period of time. It doesn't—I haven't worked it out, but it doesn't appear to be greatly different.

Q. Well, whatever it is on there would work out on the chart?

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A. It would work out on the chart.

Q. If you draw a graph?

A. Yes, right.

Q. Now, do you know of any lenders making or offering land loans in the Louisville area in 1960 and 1961 who increased prices or made less favorable loans than they had earlier offered because they foresaw that the price levels were stable and inflationary values were no longer indicated?

A. I cannot document that anyone told me that he was changing his policies. I can only tell you what my experience indicates lenders do. Lenders make decisions and judgment on the basis of their expectations of what will happen.

Q. My question was, do you know of any lenders in the Louisville area in 1960 and 1961 who made less favorable loans anticipating continued stability or a downturn in the inflationary trends?

A. Specifically, no.

Q. All right. What people or lenders who are operating in the Louisville area, 1959 through 1961, who offered, or could offer financing for land acquisition?

A. You had mortgage companies that are primarily acting as brokers, representing some thrift, or

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savings institutions, as an insurance company.

Q. Now, would these be in the trade, called mortgage brokers, mortgage bankers?

A. Mortgage bankers, yes.

Q. All right; do you have their names?

A. No; I cannot recall the names of these people at that time.

Q. All right; but you had mortgage bankers in the Louisville area?

A. Yes.

Q. All right; who else might be in position to lend if they chose to, money for the purposes of land acquisition?

A. I am not positive of the state regulations at that time regarding uninsured savings and loan associations. I do not know whether they could or could not.

Q. Okay.

A. These insured ones, I'm sure, could not. I believe at that time there were three uninsured associations in the Louisville area. I am excluding the banks because the loan would not have this type of a loan.

Q. Well now, you misconstrued my question. I didn't limit it to a hundred per cent land.

A. All right; then we'll include the banks.

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Q. I mean just maybe that wanted to lend money on land.

A. We will include the banks.

Q. Banks.

A. Well, we will include the Savings & Loan associations, insured and uninsured; we will include the mortgage bankers; we will include insurance companies operating in the Louisville area, those that are headquartered here, and those that acquire loans in this area, either directly, or through a mortgage broker.

I can only assume, without knowing the facts, that the pension funds may also have operated in this area at that time; possibly, uh, funds, endowment funds might have operated in the area.

Q. I don't want to curtail your answer, but for the sake of brevity, would we discuss pension funds and endowment funds almost as the same type of lender?

A. They would be very similar.

Q. Very similar, yes. As I say, I'm not trying to curtail—

A. Uh huh.

Q. Do you know, uh, now, you have given me here, depending on how we operate, either five or six broad categories, mortgage bankers, savings and loans, commercial

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banks, insurance companies and other funds which let's talk about as pension endowment funds, and during the period in question which is, as we know, 1959 to 1961, either by individual name if you know, or by categories which we have enumerated; can you tell us what percentage loan they would make with relation to the value of the land?

A. At that time?

Q. Yes, at that time.

A. I could not give you a specific figure and document it.

Q. All right; can you tell us what the interest rates were during that time by any specifically named entity, or category we have discussed?

A. I could not tell you that and document it. I can tell you in general terms what the rate would have been.

Q. All right; what would the mortgage bankers have charged?

A. I would have said that the prevailing rate at that time would have been in the neighborhood of six per cent.

Q. How about savings and loans?

A. I think that the rates would have been relatively comparable on a conventional loan.

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Q. All right; how about commercial banks?

A. Again, the rates would be comparable on a conventional loan. Now, on an insured, guaranteed loan it might be different.

Q. Insurance companies?

A. Same.

Q. And your funds, pension and endowment funds?

A. Basically the same, but may I emphasize—

Q. (Interrupting) Sure.

A. (Continuing) —that what been talking about is a prevailing rate.

Q. You are not saying that any of the five categories you mentioned, none by name, would vary, or they could vary?

A. On individual loans they could vary.

Q. All right.

A. But this would tend to be a competitive force, and again, it would depend upon the particular characteristics of the individual loan.

Q. All right. Now, another aspect would be the discount offered, or surcharged by—

A. (Interrupting) The charge—any charge would have been added, yes; this why—

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Q. Do you know what those discounts were during that period?

A. On principal?

Q. I would assume that's what they based it on, but what were the discounts, say by any mortgage bank or savings and loan, commercila banks, so forth?

A. This was not a period of particularly tight money.

Q. I'm aware of that.

A. And we are talking about a period where the prime rate was four and a half. Here again, I have not specifically researched what they might have been at any specific time, but I would have been inclined to say that discounting was not a common practice at that time.

Q. Can you tell us anything about the customary service fees, any of those entities, or lenders within those categories were charging during that period?

A. There is a customary service fee associated with closing costs and other expenses.

Q. Can you give us some indication, either percentage, or dollars of other yardstick measured, say a bank would charge, or savings and loan, mortgage banker?

A. Well, I probably should remember because if I recall correctly, I obtained a loan myself at approxi-

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mately this time on a house, but I—I can't recall exactly the rate that I was charged because it was a one-time charge. I would say that one half of one per cent to one per cent would probably have been common, but I would not want to say for certain that that's true; I'm just trying to recall.

Q. Yeah, conditions at that time. You gave me an example of your personal, individual home purchase. I trust that you understand I have just been discussing the acquisition of large tracts?

A. Yes.

Q. Tracts of land.

A. I'm talking about—

Q. (Interrupting) Yes.

A. (Continuing) —conditions in general as to what was the size of the fee and so on. I simply do not recall.

Q. Can you tell us anything about the maturity or repayment in terms and conditions, including prepayment, penalties, matters of that kind, prevailing during the 1959-'61 period?

Mr. Anderson: Talking about land acquisition?

Q. Sure; land acquisition, sure, yeah.

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A. Large tracts, relatively?

Q. Yes. Not square miles, but not one city lot.

A. Well, again, I cannot give you a specific illustration and say, "This is true in this instance." In general, this is something that is negotiated.

Q. Tailor-made, kind of?

A. Yes.

Q. To each loan?

A. In general.

Q. Well, I appreciate this is a general statement.

A. Right, right.

Q. Is this correct; lending sums which are a higher percentage of the security is like charging lower interest because the greater risk of full recovery, if the borrower defaults, increases the cost to the lender and reduces his profit unless he charges the greater interest?

A. I am not sure I followed you all the way through.

Q. Well, would you—I'm not trying to—

A. (Interrupting) Let's go through it again.

Q. Surely.

A. And see if I can follow you.

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Q. Surely; yes, sir. Lending sums of money which are a higher percentage of the security—

A. (Interrupting) Of the value of the property.

Q. All right.

A. All right.

Q. Is like charging lower interest because the greater risk of full recovery, if there is a default, increases the cost to the lender and reduces his profit unless he does charge the greater interest?

A. Well, you're talking about two different kinds of loans. We are back again to our illustration of the seventy-five per cent loan.

Q. All right.

A. So obviously, they are loan terms and, uh, the terms are a package in that it involves a cost; it involves a maturity; it involves the risk involved.

Q. Let me—perhaps—

Mr. Anderson: (Interrupting) If the Court please; could he answer the question? You asked it.

By the Court: You want to make any further answer?

(No response.)

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By the Court: You may ask him.

Q. I thought he was through. I didn't mean to interrupt; my apologies.

A. Well, I was practically through, on the assumption that I understood your question.

Q. Yes, sir.

A. And I'm willing to concede that if I want to borrow and I have very sound collateral, I may possibly borrow at a lower rate, but it is a different loan.

Q. I—and perhaps it was, in a sense, an unfair question to you and your answer, as I understood it, made sense.

Let's look at it in this light; if all other terms are the same except, of course, the amount or the degree of security, isn't a higher percentage loan in relation to value cheaper or more favorable for the borrower?

A. You are keeping the interest rate constant?

Q. Yes, sir.

A. You are keeping the maturity—

Q. (Interrupting) Yes, sir.

A. (Continuing) —in terms of repayment, constant?

Q. Yes, sir.

A. The only thing you are varying is the

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percentage of the value of the property that is represented by the loan.

Q. Yes, sir.

A. The hundred per cent loan is cheaper if the borrower can repay the loan.

Q. Would you also go that it's cheaper and more

favorable and perhaps they are synomymous within the context of what we are doing?

A. Well, what I—what I was trying to distinguish here is that if I have twenty-five per cent equity and I can't repay, I may lose my equity. If I have a hundred per cent loan and I have no other collateral then I have only lost what I didn't own to begin with.

So, if the borrower is able to repay, then a hundred per cent loan is a more favorable term.

Q. Let me—uh, let's elaborate on that just a little bit. Absent both parties, the borrower and lender's being fools in the twenty-five per cent equity situation, wouldn't both the lender and the borrower at least anticipate the ability to repay?

A. We are back to the word "prudent".

Q. I understand; well, all right.

A. Certainly a prudent lender should do this.

Q. You also said that in that situation the

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borrower would lose all. Let's not nit-pick with lawyers fees and court costs. If the borrower could not repay the seventy-five per cent loan and the property were sold at foreclosure, presumably it would bring full value and he would repay his loan and pocket his twenty-five per cent wouldn't he?

A. Why do you say presumably? I don't think you can make that presumption.

Q. Well, you said it's—twenty-five per cent of the value is equity and seventy-five per cent of the value—

A. (Interrupting) Initially.

Q. Initially. I didn't say it went down and neither did you.

A. No, I didn't, but I cannot presume from my illustration that he's going to receive a hundred per cent of the

value. If that would ever happen that would be a bonanza to all lenders. There would be no reason to have bad loans.

Q. Well, you could have.

A. We said earlier bankers never make bad loans; they just turn out that way. They don't make loans that they anticipate will not be repaid.

Q. Well now, Dr. Masten, could you conceive

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of a situation where the value of the security not only remains constant, but in fact, appreciates? Now, speaking now only of the value of the security, but that for reasons not connected with the value of the security, the borrower cannot make his payments and must look to the security or the lender and borrower together to repay that loan.

A. I can conceive of that condition, yes.

Q. It's not an inconceivable situation?

A. No, it's not.

Q. It's not too far fetched?

A. The collateral could go up.

Q. Yes, yes, sir.

A. It could go down.

Q. Yes, sir.

A. And no one is going to know beforehand which way it will go.

Q. I understand.

A. And that is why there is an element of risk in lending.

Mr. Anderson: If the Court please; I don't know where Mr. Reutlinger thinks he is going. We have before us one set of facts in this case that is quite clear and that is there was a foreclosure long after this inflationary spiral that these fellows are talking about

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and this is that there was—uh, the property didn't bring the amount of the loan; so, we are playing games.

Mr. Reutlinger: I don't—didn't intend to be playing games with the witness. I wanted to see what the general answer would be.

By the Court: That's right; go ahead.

Mr. Reutlinger: In the abstract matters we were discussing.

By the Court: Go ahead.

Q. I am going to read you a statement, Dr. Masten, and see what you view is of it, and as before, I'll read it slowly and don't hesitate if you are not sure of the words.

A. All right, sir.

Q. Do you agree with this statement—you may not:

"The amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. The other relevant factors include the rate of interest charged, whether the lender discounts the amount loaned or charges service for other fees

and maturity in terms of repayment."

A. Is that your—

Q. Yes, sir; I'm sorry.

A. Those would certainly all be factors. This is why we have differentiated the lengths and we said we can talk about the credit market as a whole, but when we get down to specifics, it becomes segemented because not all loans are alike.

Q. You almost said, I thought, earlier that no two were alike in this field.

A. That's what I'm saying, yes. So, obviously there would be different conditions related to each individual loan it would have its own characteristics.

Q. Well, it—all right. You are right, and if what I understand you are saying is right or correct and you agree

with what I have just read you, for one lender to determine whether the terms are cheaper or more favorable to the borrower than the terms of another lender, you consider not only the percentage of securities, but all other terms, don't you?

A. You would.

Q. And that lenders in competition with each other, even if they don't offer the same percentage of loan, to value of security, compete by varying some or all of the

other terms, in combination, don't they?

A. All of the terms can be varied as a part of the competition.

Q. Have you done any research into financing of dealers by their suppliers or manufacturers?

A. I have done no specific research. I have a general knowledge.

Q. You have some general knowledge.

A. About dealers financing, yes. This is what I was doing in Venezuela, lecturing on the money and capital market and one of the areas that we covered to the businessmen of Venezuela was the question of sources of funds; dealer financing is one.

Q. I believe I understood you to tell us that it was unique or uncommon for suppliers to extend credit or financing to dealers on the condition that the dealer buy the supplier's goods; did you tell us that?

A. I think the financing on a dealer transaction ordinarily occurs ex post facto; it is not a pre-condition.

Q. How, in some instances, would the franchisee, for example, obtain the necessary funds to buy the franchise in certain instances?

A. He might be carried.

Q. By the dealer?

A. By the dealer.

Q. Well, is that unique or uncommon, in your experience, business experience?

A. There are all forms of—this is tantamount to an accounts receivable financing. There are all forms of accounts receivable financing. They may be financed by a factoring concern; it might be turned over to a bank.

Q. Let's assume the dealer—

A. (Interrupting) It may be carried by the dealer himself.

Q. Let's assume the dealer carries it himself.

A. All right.

Q. That's not unique or unheard of, is it?

A. No, no, not the fact of carrying the accounts receivable; no, that is not unique.

Q. Oh, I, uh, went a little farther in the question and maybe I better go back to it again. Would it be uncommon, or do you still feel it is uncommon or unique in the business world for a dealer or a supplier to extend credit to a purchaser from it so that that purchaser could buy the dealer's or the supplier's goods?

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A. No, it would occur in the ordinary transaction of business and that was not one of the reasons why I classified this loan as being unique; there were other reasons.

Q. I'm going to read you something else which is a little longer and see what your view is on that.

By the Court: Well, gentlemen; it might be a good breaking point as it is two minutes to twelve and the Court would be hopeful that the lawyers could at least agree on how long we take for lunch.

Mr. Reutlinger: An hour would be ample, Judge.

By the Court: Fine; see you back at one o'clock.

(Whereupon, at about the hour of 12:00 Noon, a luncheon recess was taken, reconvening at about the hour of about

1:03 P.M., with appearances as noted heretofore, and the following proceedings occurred.)

By the Court: All right, sir.

Q. (By Mr. Reutlinger—cont'd) Dr. Masten, in my excitement this morning I had this and then I didn't

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use it. This you have already identified and it has been introduced as defendant's Exhibit 502, which is a page, or portion of the commodity price index, and I say, you have seen that and identified it; it's been introduced.

A. Yes, right.

Q. I now show you what appears to be the U. S. Department of Commerce 1967 statistical supplement to the survey of current business, page 219, and ask, first, are you generally familiar with reports of this kind?

A. I'm generally familiar, yes.

Q. Does this appear to be such a report?

A. Yes.

Q. And does the page, or portion I have given you, show for certain years, 1947 to '62, the price index on housing?

A. It does.

Q. All right, sir.

Mr. Reutlinger: I would like to introduce that into evidence as Defendants' Exhibit No. 3, uh, 503.

(Whereupon, a document entitled 1967 Statistical Supplement, Survey of Current Business, was marked for identification as Defendants' Exhibit No. 503.)

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Mr. Anderson: And just so it's clear; you don't have the definition?

Mr. Reutlinger: I don't. I'm not withholding it deliberately, I just don't have it. I would assume that could come in by rebutting, by agreement, whatever.

Q. Dr. Masten, back where we left off I was going to read to you a little bit.

A. All right.

Q. And ask you what you thought of it. Here is the statement; "It is common, in our economy, for a seller to extend financing to a distributor, or franchisee to enable him to purchase and handle the seller's goods at retail, to retail facilities, to acquire fixtures or machinery for service to customers in connection with distribution of seller's goods, or to prepare the land for and to acquire and erect the seller's houses for sale to the public. Almost all modern selling involves providing some ancillary services in connection with making the sale, delivery, installation, supplying fixtures, servicing, training of the customer's personnel in use of materials sold, furnishing display material and sales aids, extension of credit; customarily, indeed, almost invariably, the seller offers the ancillary services only in connection

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with the sale of his own products and they are often offered without cost or at bargain rates."

Now, do you agree with that statement, or disagree?

Mr. Anderson: If the Court please; before—

By the Court: (Interrupting) I understand the essential ingredient that isn't there.

Mr. Anderson: Yes, sir.

By the Court: Yes.

Mr. Anderson: And also, it sounds to me like we—we might be talking about numerous situations where there might or might not be antitrust violations.

By the Court: I understand.

A. As a generalization, as you have read it, I would accept the statement.

Q. Do you know whether any manufacturers of prefabricated houses other than Credit Corporation has offered financing on the condition that the borrower buy the manufacturer's houses?

A. I—I believe that this practice may occur in the Mobile Home Industry; it could occur. I'm not ruling it out in other instances.

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Q. All right. Of course, my question addressed itself to the manufacturer's prefabricated houses.

A. Yes.

Q. Do you use the term "Mobile Homes" interchangeably?

A. Well, I have heard that some of the mobile home manufacturers have extended credit. I have not seen any of those basic contracts, but I would not rule it out as a possibility in terms of the kind of house United States Steel Homes Corporation was producing.

Q. Do you know what land financing terms and conditions were being offered by National Homes in connection with its sale of prefabricated houses during the 1959-'61 period?

A. No, I do not.

Q. Do you have any information during that period about Harneshfaeger?

A. Harneshfaeger is primarily a machine-tool manufacturer, to my knowledge; I'm not aware of their—

Q. All right; Schultz Homes?

A. No.

Q. Kingsbury Homes?

A. No.

Q. Swift Homes?

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A. No.

Q. Inland Homes?

A. No.

Q. True-Built Homes?

A. No.

Q. Richmond Homes?

A. (Witness shook head in the negative.)

Q. Jim Walters Homes?

A. Not at that time; I have had some experience with Jim Walters since.

Q. This was during this period; uh, Peace Woodworking Company?

A. No.

Q. And, General Homes?

A. No, I'm not familiar with some of those Companies; I don't know the conditions under which they might have made loans.

Q. It is your testimony that in your opinion a loan under comparable terms to the loan offered to Fortner would not have been available from other credit sources during the period in question?

A. Yes.

Q. And you speak in a—

A. (Interrupting) On the basis that it was

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not a prudent loan.

Q. And you are speaking—

A. (Interrupting) Now, I couldn't rule out absolutely everyone; you can't. I think we might say that there is someone who has a vested interest in making that loan who might have made it. The vested interest might have been his grandfather who would have made it, and, in other words, it is a possibility, I mean. We are talking here about the normal credit relationships.

Q. Well now, I'm speaking—I'm saying any other credit sources in the question.

A. I don't know enough about Mr. Fortner nor his relatives or who might have made it.

Q. I would not include in my definition of "other creditors", Mr. Fortner's brother or sister, or whomever.

A. Well, it could be a creditor.

Q. Well, I am broad, however, when you say conventional—

A. (Interrupting) Let me put it this way—

Q. All right.

A. A lender who is in the business of lending for the purpose of making a reasonable profit without undue risk exposure would have been unlikely to

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have made this loan.

Q. All right. Now, is this—am I to understand you are talking about 1959?

A. Yes.

Q. To 1961?

A. Yes.

Q. Would such a loan have been available after 1961?

A. I thought we had covered that earlier; uh, earlier today, when I explained that during a period of inflation there is a tendency for the conditions of a loan to erode so that at a later date the probability that such a loan would have been made is greater than it would have been at that time.

Q. You used the term "a loan under comparable terms" would not have been available from other credit sources during the period in question. Now, what terms are you referring to?

A. One hundred per cent loan with no third party guarantee; the guarantee is by the parent of the lender. The rate of interest was favorable although possibly not a major factor in this particular instance, but it was—it was not an unfavorable factor.

So, the two things that I would emphasize is

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the hundred per cent loan, with a guarantee by the parent of the lender. This is the reason I am characterizing the loan as being unique.

I said if you took a normal distribution, this was not a normal loan. It was one that was on the extreme end of the distribution.

Q. I believe you testified that most conventional sources of credit are precluded by laws and regulations from making a hundred per cent loan on undeveloped property?

A. The principal suppliers of funds, yes.

Q. Which conventional sources of creditors—uh, sources of credit are so precluded and which are not?

A. Banks, commercial banks, savings & loan associations, credit unions, but they are relatively insignificant; insurance companies might be, depending upon the state laws under which they operate.

Q. Precluded from?

A. Yes.

Q. Now, which are not precluded from making such loans?

A. Well, again, it would be necessary to look at the laws of each individual state, but as a

generalization, I would say that a pension fund or a trust fund, although not being a lawyer, I am possibly interpreting this, but I understand that a trustee is responsible as a prudent man, so he might be precluded from, uh, on that basis, so we might be eliminating anyone who occupies a position of trust.

Q. All right. Is the number of lenders precluded by law from one hundred per cent financing greater than the number of lenders not so precluded?

A. In my opinion, if you're looking at the dollar volume—

Q. (Interrupting) No, I used the word "number".

A. Well, if you're talking about number, every Tom,

Dick and Harry is a potential lender, so that there are numerous potential lenders in terms of individuals. Now, if you are talking about lenders who have the status of being a lender, I mean, that's their business, then I would say that, uh, there would be more that could not make the loan than could make it and if you would look at the total volume of lending by these institutions, the overwhelming majority could not have made it.

Q. Now, when you refer to lenders who are precluded by law from making land loans in excess of a

percentage, specified percentage, do you tell us that those legal prohibitions are based upon the percentage or proportion that the loan bears to the value of the land?

A. I am to believe that it is on the basis of the appraised valuation.

Q. Let's talk now about the profit center concept used by diversified businesses which engage in more than one line of business. Can you tell me your understanding of that concept?

A. Well, I think we can use the organizational structure of United States Steel.

Q. All right.

A. Uh, as an example. A profit center, whether it earns a profit or not we will ignore for the time being, but a profit center would have been United States Steel Homes; another profit center would have been the Credit Corporation.

Q. Well then, is it consistent with your understanding of the profit center concept for United States Steel Homes Division to guarantee the Defendant Credit Corporation against the risk of loss on land financing designed to promote the sale of homes of the Homes Division?

A. May I ask you to repeat that?

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Q. Yes, sir.

A. Because I'm not sure I fully comprehend it.

Q. Surely. Is it consistend with your understanding of the profit center concept for the U. S. Steel Homes Division to guarantee Credit Corporation against the risk of loss on land financing designed to promote the sale of the Homes Division's houses?

A. It would depend upon the action of the Credit Corporation and its intent and it seems to me that what we have here is a matter of intent. We have already examined the fact that as a profit center, Credit Corporation was not particularly profitable.

If you are going to hold them to the fire in terms of being profitable, then I think you would have to say this was a relatively unprofitable center, and certainly, a corporation such as U. S. Steel could have used the funds in some other area more profitably.

Q. Well, the question had to do with the consistency of the arrangement related to your understanding of the profit center concept and the guarantee of the loan by the Homes Division, which loan was made by Credit Corporation; is that consistent with the profit center concept you told us about a moment ago?

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A. I do not believe that can be answered categorically it is or it is not.

Q. Well then—

A. (Interrupting) If you are looking at a generalization, it could be, but then you've got to go beyond that and look at the way in which Credit Corporation functioned as a lender and the purpose for which it made loans and that purpose might not be consistent.

Q. Let me ask you this; from the standpoint of the borrower, Fortner Enterprises, is the Homes Division's

guarantee of the Credit Corporation's financing any different than if he was financed by a single lender who did not require a guarantee as a condition of making the loan?

A. Well, I believe it was United States Steel that gave the guarantee.

Q. That's right.

A. Not Homes.

Q. I am speaking from the Fortner standpoint; the borower's standpoint.

A. Well, I was trying to establish what hapened as opposed to what you said happened because I don't believe that what you said happened is what happened.

Q. Oh, I—well, I think perhaps you and I

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are on a slightly different wave-length. The Homes Division is only part of, and is U. S. Steel Corporation for the purpose of the question.

A. Oh; all right.

Q. I didn't plan to mislead you in that respect.

A. All right; well, Okay.

Q. Now, from Fortner's standpoint, is Homes Division, or United States Steel Corporation's guarantee of the Credit Corporation's financing any different than if Fortner was financed by a single lender who did not require a guarantee as a condition of making the loan?

A. If I thoroughly understand you, my answer is yes, on the assumption that he could not have gotten a loan without the guarantee.

Q. Now, isn't it true that whether or not the Homes Division and now you know what I'm speaking about.

A. Right; all right.

Q. Guaranteed a loan by the Credit Corporation, the Homes Division, or U. S. Steel would ultimately bear any loss incurred if there was a default?

A. United States Steel would have borne the loss, correct?

Q. Which, within the context of our conver-

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sation, is the Homes Division.

A. All right.

Q. Now, you have told us that the land loan by Fortner Enterprises was not a prudent loan for a conventional lender. Could you give me some examples or have you already given me examples of conventional lenders?

A. I think that the lenders that we have mentioned a few moments ago would fall into the category of being prudent lenders; a bank, a savings & loan association, an insurance company, a mortgage bank, a trust company, uh—

Q. All right; were there any other types of lenders, even though they might not have been in Louisville, who could have financed the land acquisition development in the Louisville area in the 1959-61 period?

A. There are mortgage companies that operate on a national basis.

Q. Any others; any other types of lenders?

A. Well, through mortgage companies it is possible for a mortgage to enter into what we call a national market; a mortgage banker in Louisville might very well be acting in behalf of a principal in New York.

Q. Do you know how much such lenders—how many such lenders there were during that time; any idea?

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A. No, I do not.

Q. Thank you. During 1959 to 1961 were there commercial banks in the Louisville area which were not national banks?

A. Yes.

Q. And were there any commercial banks in Kentucky during that same period which were not national banks?

A. The majority are not national banks.

Q. During 1959 to 1961, were funds for land loans financing available to borrowers in the Louisville area from sources not located here?

A. I'm sure they were.

Q. Is it your testimony that in terms of geographic dimensions there is a separate credit market or markets, confined to the Louisville area which exist independent of and unaffected by the competition of lenders in any other area or areas?

A. No, that is not my testimony. My testimony is that for that particular loan, that is a sub-structure of a more generalized mortgage market.

Q. What does the term "Cross-Elasticity" of demand mean?

A. It means the substitution of one product

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for another.

Q. Could there be a reasonable cross-elasticity of demand between a hundred per cent land loan and a ninety-nine per cent land loan?

A. Well, at some point, if you keep going down, ninety-nine, ninety-eight, et cetera, you're going to get to a point where there are lenders who will come in.

There will be lenders who wouldn't make a hundred per cent loan who would make a seventy-five per cent loan which is what I thought we established earlier.

Q. Well, I'm not going to labor, by going down, now, ninety-nine, ninety-eight and so forth, which you have anticipated.

A. Yes.

Q. At what percentage would you say there was no reasonable cross-elasticity of demand between a hundred per cent land loan and one of less than one hundred per cent?

A. That would be pure guess.

Q. Well, in your position, it gets—I would say, Dr. Masten, it's better than that because you're qualified to give an opinion.

A. No, because—are you talking about a specific loan? Are you talkinug about the Fortner Loan, or—

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I mean, I don't even know what loan you're talking about so how can I, if I don't know what the conditions are, how can I other than guess.

Q. Well, then, let me have your guess, based on good generalization, which apparently you—

A. (Interrupting) Any set economic conditions that I can choose?

Q. Only that it would apply uniformly to the one hundred per cent in time and so forth. I'm not going down, ninety-nine, ninety-eight and so forth, but—

A. Well, but what I'm trying to say is that the lenders are different; they will accept different conditions, uh, differences. I have to recognize there are some lenders who wouldn't have loaned even a fifty per cent so this cannot be clearly identified with anything other than an estimate.

Q. Well, let me have your best judgment.

A. All right; fifty per cent, if you want a figure. I don't see that it serves any particular purpose because we are not talking about something that is specifically identifiable.

If we go back to the Fortner Loan—if Fortner had had a fifty per cent equity at the time, his chances of getting credit from other sources would have been much

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greater than on a hundred per cent, but there might still have been lenders who would not have loaned him at fifty per cent.

I don't know enough about the situation of the borrower at that time.

Q. Do you have any authority to support your view that the figure is fifty per cent?

A. No, I haven't. I just—I told you I was guessing.

Q. I understand.

A. There is no way you can get a figure with any degree of certainty. So, you wanted me to pick one out of the air; I picked one.

Q. All right. Now, did you answer that question on cross-elasticity of demand solely in terms of percentage or proportion the loan bears to the value of the land?

A. No, I did not; it was a random figure which I have indicated before. I gave you, uh, and in my opinion had very little meaning.

Q. All right. Is it your opinion that cross-elasticity of demand can be measured solely on the basis of percentage of value?

A. It is my opinion a cross-elasticity of

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demand can be measured only in terms of abstract theory and has no relevance.

Q. Do you have—uh, you have no other elements though that would give you—

A. (Interrupting) I admit it as a principle but I don't think you can do anything, other than, uh, if you want to stick the chart up here and say, "All right, this chart represents truth and by assumption, they represent truth." I am an economist. I've been doing that for thirty-five years, but I at least try to tell the students that this is an assumption and it's a theoretical assumption; it's a theoretical truth.

Q. What elements would you, however, use in reaching even an educated guessive opinion in measuring the rela-

tionship of elasticity of demand with one type of loan or another?

A. The only way I would be able to do it would be to go out and interview these people at that time with a questionnaire, the lenders; "Would you make a loan under these conditions? These conditions?," and so on, and make the conditions move from the most liberal conditions that we are dealing with in this instance, down to conditions that might be much more stringent, fifty per cent loan, et cetera, and say, "Would you?", and at some point somebody

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would say yes. I don't know where these people would begin saying yes, but I feel that they certainly would be saying yes at some point, but at what point they would all say that, I have no way of knowing.

I don't even know how you could find out how because if they said yes today, they might change their mind tomorrow.

Q. I'm going to read to you one more time and see what your views are on this:

> "Commercial banks, in competing with other credit financing sources, enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. The reason for the competitive disadvantage of most lending institutions, vis a vis banks, is that only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, and by virtue of their unique power to accept demand deposits."

A. They accept demand deposits; I accept that. Now, whether they have a unique advantage; they must maintain the required reserve; they must have certain non-income

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producing assets; they must, for reasons of liquidity, hold

liquid assets, uh, liquid securities, which historically, ordinarily give a low rate of return, a low yield.

Q. Well now, do you agree or disagree with the thing I read?

A. I'm trying to disagree with it.

Mr. Anderson: Court please; I don't think he has to agree.

Mr. Reutlinger: He doesn't have to; he can say yes or no.

The Witness: All right; if then I've got to say yes or not, as you have read it, I'll say no.

Q. All right. Now, you also, in the last part of your testimony, referred to the Plaintiff as being a separate segment of the lending market. When you referred or used the words "separate segment", are you referring to a sub-market?

A. I—

Mr. Anderson: Court please; he never said that the Plaintiff was a separate mark—separate segment of anything.

Mr. Reutlinger: Plaintiff's lending market then.

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Mr. Anderson: Huh?

Mr. Reutlinger: The market in which the Plaintiff obtained his loan, I think he said was a separate segment.

Mr. Anderson: All right. To me, that is a little different, Mr. Reutlinger, than what you said, sir.

The Witness: If I had finished my discussion of banking I would have gone ahead to explain to you that bankers compete in a certain market. They do not compete in all markets; not all lenders compete in all markets; so, the market as a whole, is divided into sectors and if you want to call them sub-sectors, uh, I have no particular objection.

What I am trying to imply is that the demand for credit is not a homogeneous demand; neither is the supply of credit homogeneous.

Q. Dr. Masten, how would you define geographic and product or service dimensions of the market segment about which you have testified ?

A. Well, if I knew the answer to that in terms of commercial banking I could have saved the Board of Governors a great deal of difficulty, because they've been trying to define it in every case that comes up under a

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merger or a holding company as to what is the geographical market; whether banks are competing with lenders, or are they competing solely with other banks.

This is not something that I—last weekend, exactly a week ago this morning, I was lecturing to a group of advanced bankers in the State of Nebraska and I said, "If you bring me a case and it is clearly one side or the other, I can probably tell you what will happen."

The trouble is that most of these cases involving acquisitions by holding companies or mergers fall somewhere in between and you can't really decide until it has gone through the courts, the geographical market or the product market.

So, I can't give you an answer that clearly says at any given time what the geographical or the product market is. What I was trying to say is that the product offered by Credit Corporation was so differentiated that it was about the only lender that could have made that kind of a loan.

Q. Well now, what is the basis on which you concluded that there was a separate market segment or a sub-market?

A. Differentiated product. Here is a specific loan. We know the terms of the loan. The terms of

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that loan took it out of a broader market and put it in a separate market where it stood virtually by itself.

Q. Well then, do you claim that the customers for a seventy per cent land acquisition and development would not be interested in obtaining a hundred per cent loan?

A. I didn't say that. I would say that someone who is willing to put down thirty per cent of his own money has a broader range of lenders that he can contact.

Q. And you feel that a seventy per cent land loan serves a different end than a hundred per cent land loan?

A. It serves the lender, if he is a bona fide lender, to a different end. He's got some protection.

Q. Do you claim, uh, that there is no price interrelationship or sensitivity between a seventy per cent land loan and a hundred per cent land loan?

A. Well, I'm trying to say that a seventy per cent land loan is not a one hundred per cent land loan, but they are two entirely different products and it seems to me we are back to where we started. Obviously, the more equity the borrower has, the more opportunities he's going to have to obtain credit from different sources.

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Q. Uh huh.

A. Now, I don't know that I have answered your question, but this is what I'm trying to say in terms of my understanding.

Q. Let's—maybe we can approcah it from a different way. Insofar as the borrower is concerned, does a seventy per cent land loan serve a different end than the hundred per cent land loan?

A. It may, yes. Are you interested in why I think so, or not?

Q. Well, I certainly would not say you couldn't tell us that.

A. I would say that because a seventy per cent borrower has thirty per cent of his own equity, he has much more freedom in terms of his choice of lender. He does not have to enter into any kind of an agreement which ties him to a certain product.

Q. Do you claim that a seventy per cent land loan has any different intrinsic attributes than a hundred per cent land loan as opposed to merely the fact that it is cheaper for the borrower?

A. I have tried to indicate that I think they are two different loans and that, in a sense, they are two different markets. They may not be totally unrelated,

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depending upon the situation, in regard to the borrower. If I am the borrower and I have enough of my own funds to put up thirty per cent and some one comes along and offers me a hundred, then I have an option.

Q. Do you claim that lenders who offer a hundred per cent land loans don't also offer seventy per cent land loans?

A. It is entirely possible that they do.

Q. All right.

A. Then, in which case, there must be some basis for them discriminating.

Q. All right. Let me ask you this, Dr. Masten, and you may refer to Mr. Anderson's letter of November 9th of this year, which I gave you earlier. When did you first discuss this market segment concept with Mr. Anderson; last week?

A. I believe so. Now, whether we discussed it—I've forgotten how long I've been involved in this. I was all primed to come here last March.

Q. Well, so were we.

A. And we discussed it when; last November?

Mr. Anderson: Yes, sir.

The Witness: So, whether I mentioned it at some earlier time, I simply do not recall.

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I know we specifically talked about it last week, yes.

Q. Last week; and did you or Mr. Anderson seek the meeting to discuss this?

A. He came to Athens to talk to me in general about the case.

Q. All right.

A. Let's review my position. I was primed, ready to come last March. I have been traveling all over the Western Hemisphere. I have been to numerous conferences. I haven't looked at this case until he came last week and the purpose was to get me back in the swing.

Q. Well, that is a valid purpose then; I won't fuss at you, and I've given you a copy of those a moment ago, had you discussed the market segment or submarket concept or even with anybody else, or Mr. Anderson?

A. No.

Q. You had not?

A. I also thought I covered that. I said I know we talked about it last week.

Q. Yes.

A. Whether we discussed or talked about it—let's see; how many meetings had we had prior to that, one or two?

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Mr. Anderson: Two; one brief one, and—

The Witness: (Interrupting) But whether we talked about it at that time, I simply do not recollect, but I know we talked about it last week.

Mr. Anderson: I'll be happy to testify about it if Mr. Reutlinger wants to call me, Judge.

Mr. Reutlinger: I have no intention of doing that.

Q. Did you suggest the market segment concept to Mr. Anderson, or did he suggest it to you?

A. I believe that I probably suggested it to him and I can tell you why if you will care to know.

Q. Well, you've answered my question.

A. All right; okay.

Q. Uh, when did you first conceive of this concept as applicable to this case?

A. Well, I teach a course in money market. We talk about the term structure of interest rates. There are two principal theories of interest rates; one has to do with the segmented market theory; the other has to do with the expectations theory.

I probably was telling my class and the idea came to my mind while I was teaching. I probably said to

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myself, "Hell, that applies here." I mean, I don't really know beyond that. I mean, we've got a different market.

Q. Are there any economic publications or treatises which support your opinion that this is a market segment or a sub-market, as you have defined it?

A. This specific one?

Q. Yes, sir.

A. There's—you have a whole body of economic literature.

Q. I'm sure you have.

A. Resolving around the conflict between those theories; it's to accept a segmented market approach v. those who accept an expectations theory.

Now, did anybody who ever wrote apply, as I have? I have to say I haven't seen it. I don't know whether they did or not.

Q. Can you give use the names of those—the names of some of those publications that you—

A. Well, Burton Milefield has a couple of books that deal with it and he's a principal writer in that area. Now,

he happens to prefer the expectations theory, yet the segmented markets theory is very old, nonclassical theory.

If you would go through the American Economic

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Review, or the Journal of Finance you would see, and I've had students who have written term papers—I'll probably get one next week, on this topic from my graduate students who deal with this and they will come in with a nice bibliography that they've got from the learned journals.

Q. Have you read any issues of the Columbia Review?

A. No, I have not.

Q. Let me ask you a hypothetical situation and see what your reaction is to this; suppose that a commercial bank during the 1959—'61 period to which you have referred grants loans to established, successful builders, equal to one hundred per cent of the cost of acquiring and developing land for subdivision development without any security; in other words, just on a line of credit.

Would such loans be in the same market segment or sub-market which you have testified, included the loan to the Plaintiff, and I can—

A. (Interrupting) Well, as you have read the statement, I am inclined to believe that banks would have been precluded from making, uh, that kind of a loan. Now, if you want to say—

Q. (Interrupting) Well, this is a hypotheti-

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cal question.

A. All right. Hypothetically, I would assume that before a bank made a loan, a line of credit which was going to be drawn, one hundred per cent, it would want character, capacity, capital, collateral, and therefore, it would not have been in the same sub-sector as this loan, given the collateral behind this loan and the terms of this loan.

Q. You will be pleased to know that I'm going to read to you but one more time.

A. All right.

Q. And ask you whether you agree or disagree with this—

A. I'm sorry they haven't been bedtime stories, but—

Q. Well, that's all right, Dr. Masten.

"The credit seller has many options. Because of the terms of the loan, its quality can be varied quickly in many ways. While the credit purchaser initially asks for a certain type of loan in a certain amount on certain terms; whether he receives what he optionally wants depends on the seller's evaluation of whether the purchaser is an excellent, good,

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average or poor credit risk. A good credit risk might want to borrow a large aomunt at the prime rate with no collateral terms available only to excellent credit risks. The seller, perceiving the risk on those terms as being too high, might still extend the amount at an interest rate higher than the prime rate, or require that the loan be secured by adequate collateral.

There might be a number of possible variations in any given situation. Credit sellers, unlike other sellers, can vary the product they offer as to each buyer as both the credit needs and the risk factor of each buyer change."

Now, would you agree with that or not?

A. I would agree if you will allow me to add a proviso.

Q. (Reutlinger nodded head affirmatively.)

A. I do not believe that applies to this situation.

Mr. Reutlinger: That is all.

Mr. Anderson: We have no further questions of Dr. Masten, Your Honor.

Mr. Reutlinger: You may be excused as far as we are concerned.

Mr. Anderson: Court please; uh,

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had indicated that he thought he was going to take an hour or a little more this afternoon after lunch, so I have Ralph Logan coming at 2:30 and Mr. Will at three o'clock. Do you want me to get on the 'phone and try to get somebody over here more quickly than that?

By the Court: Well, I'd like to if we can do it without too gerat an inconvenience to him; so, let's stand in recess then and see how you can make out on that, but you have got somebody due at 2:30?

Mr. Anderson: Yes, sir.

By the Court: All right.

(Whereupon, at About the Hour of 1:23 P.M., a Recess Was Taken to About the Hour of 2:15 P.M., Whereupon, the Following Proceedings Occurred:)

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By the Court: All right, sir.

Mr. Anderson: Court please; we would like to call Mr. Ralph Logan.

MR. RALPH H. LOGAN, called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination

By Mr. Anderson:

Q. Mr. Logan, would you give us your name, please, sir, for the Record?

A. Ralph H. Logan.

Q. And Mr. Logan, are you a duly licensed and practicing attorney in the State of Kentucky?

A. Yes, sir.

Testimony of Mr. Ralph H. Logan

Q. Uh, do you also hold a position with the Southern Savings & Loan Association?

A. Yes, sir; I'm its President.

Q. All right; and how long have you been the President of that company?

A. I believe since 1955-6, somewhere along there.

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Q. Is that Company at the present time a Federally insured company?

A. It is Federally insured; yes, sir.

Q. All right. How long has it been Federally insured?

A. Since June 27th of last year.

Q. All right. Prior to that time then, of course, it was not Federally insured?

A. That is correct.

Q. And would you please explain again, for the benefit of the Record, Mr. Logan, just exactly—strike that. Is this a State chartered savings and loan association?

A. Yes, sir; it is.

Q. Would you explain how, in general terms, a State chartered savings and loan association operates; how it receives or obtains, uh, the funds that it uses, and, uh, what is done with the funds and how the depositors or whatever you call them, uh, receive monies from the company?

A. Well, we receive our money by people making deposits into the Association, and, under the State chartered operation, it was as though they were stockholders or, in other words, it works just like putting money in any

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savings account or purchasing certificates.

On these savings accounts and certificates we pay what we call dividends which are declared, based on the earnings of the Association. We loan money on First Mortgages and on, for the most part, improved property.

Testimony of Mr. Ralph H. Logan

Q. All right; and what is the structure of the management of Southern Savings & Loan Association, sir?

A. Oh, we have officers and a board of directors.

Q. All right; and did you have that same structure in, uh, the period of time that we are concerned with in this lawsuit, which is 1959 through 1961?

A. Oh, yes.

Q. Uh, do you have any committees which are active in the Association?

A. Well, yes; we have an Appraisal Committee and a Finance Committee and things of that nature.

Q. All right; and have you had those committees during the course of the operation of the Company?

A. Yes, always.

Q. Now, Mr. Logan, uh, does the Company have any bylaws in effect?

A. Oh, yes; yes, sir.

Q. Did the Company have bylaws that were, uh,

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in effect that covered the period of 1959 through 1961?

A. Yes, sir.

Q. Would you tell the Court, please, sir, whether or not you had any bylaw in effect during that period of time that pertained to, uh, land acquisition and development loans?

A. Well, the bylaws would apply there as to the same as any others except that we were restricted primarily to making loans on improved properties. In other words, the land would already have the improvements on it.

Q. All right, sir. Well, did the Southern Savings, through its bylaws and through the operation of its Board of Directors and its Committees have, in effect, sets of standards which they used in making or, uh, they followed in making loans?

A. Yes.

Q. And let me ask you this question, sir; during the period 1959 through 1961, was Southern Savings & Loan Association making any land acquisition and development loans?

A. No.

Q. If, uh, a substantial loan were to be contemplated by Southern Savings, let's say a loan of fifty thousand dollars or more, in 1959 through 1961, uh,

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how would a loan of that nature or a larger loan, have to be handled, or approved at Southern Savings?

A. Well, a fifty thousand dollar loan would of course, after it was appraised, would have to be approved by the Board of Directors as a whole.

Q. All right, sir. Does the Finance Committee of Southern Savings have to approve all loans that it makes?

A. Well, yes, it has to approve them, but depending on the size of them, whether or not the Board of Directors has to approve them.

Q. Right; okay. Let me ask you this, sir; what is the largest loan that you can think of that Southern Savings has made?

A. Somewhere between two hundred and two hundred fifty thousand dollars.

Q. All right. Let me ask you to assume, sir, that Fortner Enterprises, Incorporated, in 1960, was a separate corporate entity; that it had at that time a sixteen thousand dollar deficit; that it had one hundred eighty-seven—that it had available to purchase, one hundred eighty-seven lots in the form either of developed lots or undeveloped real estate which had been platted into lots.

Let me ask you to assume further, sir, that the

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cost to the Fortner Enterprises Corporation, uh, of acquiring that land and of developing the property, uh, was a total of $319,000.

Would Southern Savings & Loan Association, in 1960, have lent Fortner Enterprises Incorporated, the $319,000 to purchase the land that I have described and develop it?

A. Well, I say flatly, no, based on our situation at that time and based on the fact that we have never made that size loan and I believe you started out by saying it was already, uh, showed some sizeable deficit, but, uh, we wouldn't have made it—I wouldn't, at that time, even if it didn't show a deficit.

Q. All right, sir.

A. And in this amount of money on unimproved land.

Q. Let me ask you this question, sir; would the period 1959 through 1961, uh, in that period, would Southern Savings & Loan Association have made a one hundred per cent land acquisition and development loan to any corporation without personal guarantees of any officers of the corporation?

A. We wouldn't make a loan to any corporation without the personal guarantee of some individual.

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Q. All right, sir; has Southern Savings always required personal guarantees, Mr. Logan?

A. Yes, sir.

Q. Again addressing ourselves to the period 1959 through 1961, Mr. Logan, let me ask you, did you generally, as the President of Southern Savings & Loan, attempt to keep up with the market conditions and the types of loans that were available in this area during that period of time?

A. Well, I—I would generally know it, yes.

Q. All right; during that period of time, sir, did you know of any, uh, conventional or normal type lending source that was doing business in the Louisville and Jefferson

County, Kentucky area which was making one hundred per cent land acquisition and development loans?

A. Well, I could only speak primarily for Building & Loans and, uh, I was—I am unaware of any Building & Loan that would have made a hundred per cent land acquisition loan in those days, and from just general knowledge, I didn't know anybody that was.

Q. All right, sir. Mr. Logan, could you briefly tell the Court, uh, your understanding of why—let me put the question another way. In your opinion, again addressing ourselves to the period of time of 1959 through

1961, in your opinion, as the President of Southern Savings & Loan Association, uh, would a one hundred per cent land acquisition and development loan be a prudent loan?

A. I would say no.

Q. All right, sir; could you give us any reasons why?

A. Well, a land acquisition loan, as I would understand it, would be raw ground that had not been improved and it takes a great deal more than just the purchase price to develop that type land to put it in a position where it could make any profit off of it and, uh, of course, it has no income to assure you of any repayment from the land itself or from the property that has the loan on it, would be our first thing we would look at.

Q. Uh huh; are there—would you state whether or not there are any—the risks are greater or lesser when you get closer to the hundred per cent cost of acquiring and developing land?

A. Well, I'd say the hundred per cent is, uh, above marginal at any point, any kind of property.

Mr. Anderson: All right; that is all we have, Your Honor.

By the Court: All right.

By Mr. Reutlinger:

Q. Mr. Logan, I am going to show you page five of some answers to interrogatories which were served on us last January and ask you to read that brief paragraph there relating to you.

A. It says Ralph Logan, President, Southern—

Q. (Interrupting) You don't have to read it out loud.

A. Oh, you just want me to look at it; all right. (Doing so at this point.)

Q. Yes, sir. Does that accurately reflect your position, uh, testimony?

A. I would say so, yes.

Q. Do you know of any lenders who were making and offering land loans on property in the Louisville area in late 1960 and all, uh, until August of 1961, who increased their prices or made the terms of such financing less favorable than they had been offering prior to that period?

A. I would hesitate to try to answer that.

Q. All right. Now, I'm going to ask you some questions about each lender known to you, regardless of the type firm, and whether or not it was located in

Louisville and which offered financing for acquisition and/or land development of residential real estate during 1960 and '61. Can you tell us what percentage loan in relation to land value each offered during that period including ,each different percentage offered by the same lender?

A. I don't know what the question is.

Q. All right. First, do you know of anyone who was lending money on undeveloped land or raw land during the period of 1961 and '61; any lender in the Louisville Market, any type?

A. There were loans being made. Now, who was making them, I don't—I can't say right at the moment.

Q. All right. Can you tell us and identify if you can, in particularity, the percentage of the loan in relation to the value of the land?

A. I can only tell you as to our institution. What other institutions may have done, I do not know.

Q. All right; well, can you tell us the interest rates on such type loans offered by other institutions, including any variations?

A. Again, I can only tell you ours.

Q. I'll ask you the same question, same general question regarding the discounts by others?

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A. No, it would only be what I had heard. I could only tell you again, what we would do.

Q. All right; and can you tell us anything about the service fees of other lending institutions of any type on that type loan?

A. Again, I can only speak for ours.

Q. And can you tell us about maturity and repayment terms of the other lenders during that period?

A. The other lenders, uh, only what I would have seen in the courthouse as to their mortgages that were recorded, and those I couldn't tell you specifically.

Q. Well, is there any reason why you can't answer the questions I have asked you about other lenders during that period generally?

A. As I say, I—the only way I could answer them would be to quote what you hear from others and I only know what we did.

Q. Isn't it true that lending sums which are a higher percentage of security is like charging lower interest because the greater risk of full recovery, if the borrower

defaults, increases the costs to the lender and reduces profit unless, of course, he charges more interest?

A. I wouldn't have any argument with that.

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Q. All right; and then isn't it also true that if all of the other terms are the same, then a higher percentage loan in relation to the value of the security is cheaper, or more favorable to the borrower; interest the same; maturity—maturity the same; all other terms are the same, then a higher percentage loan in relation to the value of the security is cheaper, or more favorable for the borrower?

A. I'd have to think about that one for a little while. The language is a little, uh, around in circles for me right there.

Q. I'm going to read you something else and see if you agree or disagree with it:

> "The amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors include the rate of interest charged, whether the lender discounts the amount loaned or charges service or other fees, and the maturity, in terms of repayment."

A. You are asking me if I agree with that?

Q. Yes, sir.

A. If there are other elements that would be

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involved; yes, there are other elements involved.

Q. All right. Do you agree that in order to determine whether one lender's terms are cheaper, or more favorable to the borrower than the terms of another lender that you cannot consider only the percentage of the loan to security, but must consider all those other terms?

A. Well, certainly you consider all other terms, but there are certain basic things which you do not—you must consider above all else.

Q. Now, I'm speaking to the borrower's standpoint, not the lender. In order to determine whether one lender's terms are more cheaper or more favorable to the borrower than the terms of another lender—

A. Oh, you are?

Q. (Continuing) —you cannot consider only the percentage of loan to security, but must consider all other terms as well?

A. Oh, for a borrower, yes; he must consider all of the elements of it, certainly.

Q. Now, don't you agree that lenders can compete with each other, even if they don't offer the same percentage loan to value of security, by varying some or all of the other terms?

A. Yes, you can do that.

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Q. Now, in making a land development loan doesn't the lender look to the cost of such acquisition and development or to the value of the land as so developed in deciding what percentage of the security he will lend?

A. I don't know what others will do. We look to the value of the land.

Q. All right; that's—do you know what land financing terms and conditions were being offered by National Homes, selling its prefabricated house packages in the 1959-'61 periods?

A. No, I did not.

Q. And Harneshfaeger Homes?

A. No.

Q. Schultz Homes?

A. No.

Q. Kingsbury?

A. No.

Q. Swift?

A. Swift, now, uh—

Q. Swift Homes.

A. Swift; we had some experience with.

Q. Well, do you know what terms they were doing—uh, offering in that period, '59 to '61?

A. As I recall, their rates were, uh, high.

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Q. But you speak only of the rates.

A. Well, I would hesitate to speak about anything else.

Q. All right; Inland Homes?

A. Inman or Inland?

Q. Inland—Inland.

A. Inland Steel?

Q. No, I don't think they are any relation to Inland Homes.

A. All right; I'm not familiar with Inland Homes.

Q. True Built Homes?

A. (Witness shook head in the negative.)

Q. Know anything about them?

A. I don't recall True Built Homes.

Q. Richmond Homes?

A. I don't recall any Richmond Homes.

Q. Jim Walters Homes?

A. Now, wait a minute.

Q. Peace Woodworking Company?

Mr. Anderson: He said wait a minute.

Mr. Reutlinger: I'm sorry.

The Witness: I'm trying to

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recall if Walton is the one that is still operating maybe in the Southern and Western part of the State of Kentucky and if it is, then—and I don't know that it is, uh, I would have the same thing to say about them that I said about Swift.

Q. Rates were high?

A. Yes.

Q. But no other terms, to your knowledge?

A. Well, no.

Q. And Peace Woodworking Company?

A. Peace?

Q. (Spelling) P-E-A-C-E.

A. No, I'm not familiar with that.

Q. And the General Homes?

A. No, I'm not familiar with General Homes.

Q. Now, you have told us as a matter of policy that your building and loan association would not make a hundred per cent land loan. A substantial reason behind that policy is that the additional costs incident to the greater risk might reduce profits, isn't it?

A. Well, uh, you mean to the borrower?

Q. No, to you.

A. To the Building & Loan?

Q. Yes, your profits.

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A. No, our profit is established when we make the mortgage. The only thing we have to be afraid of is to reducing the profit, uh, is that they wouldn't make the payments on the loan and that the property would not then sell for value of the mortgage. We don't get to make the profits, just the interest.

Q. In 1960 and '61—now, you may have answered this; did you have any proportion of your total business in lending money for the acquisition and development of lands for residential subdivision?

A. In 1960?

Q. And '61?

A. '61?

Q. Those two years.

A. I can't specifically say, but if we did, it was a very, very small amount.

Q. All right. What other types of lenders did you compete with for that type of financing?

A. We—we didn't compete with any of 'em from that type of financing because we didn't particularly, uh, we didn't have any of it except very little.

Q. Yeah. Were there any lenders in that market located outside of Louisville?

A. Oh, I'm sorry. I mean, loans were being

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made to develop land at that time.

Q. Did you do any of that even though it was outside of Louisville?

A. We never have.

Mr. Reutlinger: Thank you.

Mr. Logan: Yes, sir.

Mr. Anderson: Thank you.

Mr. Reutlinger: This witness may be excused as far as I am concerned.

Mr. Anderson: We will call Mr. Will.

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MR. CHARLES C. WILL, Sr., called as a witness, by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination

By Mr. Anderson:

Q. Mr. Will, would you give us your name, for the Record?

A. Charles C. Will, Sr.

Q. And, Mr. Will, where do you live?

A. Uh, 3514 Mt. Ranier Drive, Jefferson County.

Q. Mr. Will, are you, first of all, a duly licensed and practicing attorney in the State of Kentucky?

A. Yes, I am.

Q. And what is your business, or profession?

A. I'm President of Portland Federal Savings & Loan Association.

Q. All right, sir. How long have you been associated with Portland Federal, sir?

A. Well, as attorney until, uh, 1940 to 1960, and as President, from '60 to today.

Q. All right; and are you the chief executive

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officer of that Company?

A. I am.

Q. And have you been that since you became President in 1960?

A. That's right.

Q. Uh, Mr. Will, is Portland Federal Savings & Loan Association a federally insured association?

A. It is.

Q. Addressing ourselves to the period of 1959 through 1961, uh, were there any regulations or controls of any type applicable to, uh, Portland Federal concerning their making of land acquisition and development loans?

A. Yes, the Federal regulations, I believe, were instituted in 1959 relative to land acquisition loans.

Q. All right. Can you tell us if there was any, uh, percentage applicable to land acquisition and development loans during this period of time?

A. Sixty—that's right; sixty per cent of the value of the land, raw land, and sixty per cent of the development costs.

Q. All right, sir; now, has Portland Federal since that time continued to be under regulations concerning land acquisition and development loans?

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A. We have.

Q. All right, sir; now, uh, Mr. Will, I will ask you to

assume that Fortner Enterprises, Inc., in 1960, uh, was a separate, independent corporation; that at that time it had a deficit of $16,000; that it had available that it could acquire, uh, from a separate company, one hundred eighty-seven lots, thirty some odd of which were in a developed state and the remainder being in an undeveloped state, but platted that the cost of acquiring that real estate and developing it was, uh, $319,000.

Now, let me ask you first of all if Portland, uh assuming those facts to be true, if Portland Federal Savings & Loan Association, in 1960, or 1961, would or could have made such a loan to Fortner Enterprises?

A. We couldn't have made such a loan.

Q. Uh, would you have made a loan if you could have, uh, would you as a matter of business policy, have made a one hundred—a loan which would amount to one hundred per cent of the costs of acquisition of land and development?

A. No, we couldn't under the regulations.

Q. All right; well, my question, sir, was if the regulations had been, uh, had not existed, would your Company have done so as a matter of business policy?

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A. Oh, no; we wouldn't make a hundred per cent loan.

Q. All right; can you explain to us why you would not have made such a loan if you could?

A. Well, I think for practical purposes, a hundred per cent loan is more or less buying the property and, uh, in other words, it's just not a conservative loan.

Q. All right was Portland Federal making some land acquisition and development loans at the sixty per cent level that you have told us about in 1959, '60, or '61?

A. I think we made our first loan, land acquisition and development loan around about that time, '61 or early '62, somewhere along there.

Q. And what percentage loan was that?

A. Sixty per cent of value of the raw land, plus the development costs.

Q. All right; sixty per cent of the value of the raw land.

A. And the development costs.

Q. All right; would the value of the raw land represent the, uh, cost to acquire that raw land; is that what I understand the figure to be?

A. No, in other words, we would take the

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value of the land; we could lend sixty per cent of the value of the land and we determined what the development cost was and we could lend sixty per cent of the development costs.

Q. All right, sir; well, what I'm trying to find out, sir, is the sixty per cent of the value of the land figure that you use, is that value of the land figure when the land is in its undeveloped form, or is it in its developed form?

A. The value—the value of the raw, undeveloped.

Q. All right, sir. Now, the land acquisition and development loans that you were making, uh, during this period of time to which we have referred, could you tell us what the interest rate was that was charged?

A. Six per cent.

Q. All right; and what was the general length of these loans?

A. Generally about two years; just long enough for them to get the land developed and sold off in finished lots.

Q. All right; were there any points charged or service fees charged in addition to the interest rate?

A. Well, we charged varying service fees

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from, uh, up to five per cent. Of course, in determining the service fee, we naturally wanted to get some of the permanent home financing so we would, uh, refund part of the service fee up to eighty per cent of the service fee on the

basis of the number of houses we got permanent loans on, but not to exceed about twenty-five to thirty per cent of the lots.

Q. All right. Well, did the—did the building—uh, the builder have any contractual obligation to you to require the loans to be made?

A. No.

Q. Well, during this period of time, 1959 through 1961, did you, as the President of Portland Federal, uh, attempt to keep yourself abreast of the, uh, the types of loans that were being made in this area?

A. Well, generally, uh, we try to keep familiar with the types of loans being made by our immediate competitors and so we knew all the different types of loans that were being made generally, uh, keep track of them.

Q. All right, sir. Do you know, uh, during this period of time, sir, of any one hundred per cent land acquisition and development loans that were being made in this area?

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A. No, I had no knowledge at that time of any.

Mr. Anderson: All right, sir; that is all we have, Your Honor.

Cross-examination

By Mr. Reutlinger:

Q. Mr. Will, I'm going to show you page four of Plaintiff's Answer to Defendant's Interrogatories which was served on the Defendants in January of this year and on that you will find two literary paragraphs which seem to be attributed to you, and glance at it and I'll ask you a question about it.

(Thereupon, the Witness Did as Requested.)

A. I would say I probably was probably generally familiar; that's right.

Q. Does this reflect your testimony and position on the subject?

A. Uh huh.

Q. You tell us there that your Company was prohibited by regulations from making one hundred per cent land acquisition and development loans, or loans comparable thereto during that period, '59 to '61. Can you define the term, or tell us what you mean by loans comparable

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thereto?

A. Single family dwellings.

Q. And in that statement you have just read you also state that one hundred per cent land acquisition and development loans of the type made to the Plaintiff—that's Fortner, were not generally available under such terms, or comparable terms to borrowers in the Louisville and Jefferson County area.

Can you define or tell us what you mean by "loans of the type made to the Plaintiff," and by your reference to such terms or comparable terms?

A. Well, my understanding was it was a land acquisition and development loan, a hundred per cent value and that the terms, as I recall, were six per cent interest and one per cent discount, and generally, I didn't know of anyone in this area that was making that type of loans.

Q. Do you know of any lenders making, or offering land loans on property in the Louisville area in 19—in late 1960, and until August of 1961, who increased their prices or made the terms of such financing less favorable than they had been offering prior to that period?

A. No, not what I know of.

Q. Isn't it true that lending sums which are a higher percentage of the security is like charging

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lower interest because the greater risk of full recovery, if the borrower defaults, increases the costs to the lender and reduces his profit unless he charges more interest?

A. I didn't get—uh, didn't quite get that question.

Q. All right; I'll start over. Lending sums which are a higher percentage of the security is like charging lower interest because the greater risk of full recovery, if the borrower defaults, increases the cost to the lender and reduces his profit unless, of course, he charges the higher interest rate?

A. Well, I would say generally that a loan or, the ratio, or rather the ratio of loan to value has some bearing on what the interest rate would be because the high interest or the high loan ratios, uh, have more risk to them and naturally, the lender has to hedge some to cover up possible loss.

Q. Then isn't it also true that if all other terms are the same except then a higher percentage loan in relation to the value of the security is cheaper, or more favorable to the borrower?

A. Uh, the interest rates being the same, it wouldn't look like it would make any difference to the

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borrower what the terms were.

Q. I'm going to read you a statement and see what your view is on it, whether you agree or disagree.

"The amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. Other relevant factors include the rate of interest charged, whether the lender discounts the amount loaned, or charges service or other fees, and the maturity in terms of repayment."

A. Generally, that is correct.

Q. All right; do you agree that in order to determine whether one lender's terms are cheaper or more favorable to the borrower than the terms of another lender, you can-

not consider only the percentage of the loan to security, but must consider all other terms as well?

A. Well, I would say you would consider all terms, but some of the terms, loan ratio, are more important than some of the other items, but I would say you, uh, that you consider all.

Q. Do you agree that lenders can compete with each other even if they don't offer the same percentage loan to value of security, by varying some or all of

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the other terms?

A. I think that's right.

Q. I think you have answered this, but I'd like to do it again to make sure; in making a land development loan doesn't the lender look to the cost of such acquisition and development, or to the value of the land so as developed in deciding what percentage of the security he will lend?

A. Well, under the regulations, we do that. We can lend sixty per cent, uh, come to value, it's the lesser of the land acquisition cost, plus the cost of the development.

Q. All right.

A. As compared to the value of the developed lots. For example, if it costs fifty thousand dollars to acquire the property and fifty thousand dollars to develop it, after it's developed it's worth a hundred and fifty thousand; we can only lend sixty per cent of the lesser figure of a hundred thousand.

Q. Do you know what land financing terms and conditions were being offered by National Homes in promoting the sale of its homes in 1959, '60 and '61?

A. No; no, I do not.

Q. Do you have any information on, uh, on

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Harneshfaeger Company—same type?

A. They generally didn't operate in our area, as I recall. I never heard of any loans that they had made.

Q. Schultz Homes?

A. No, I never heard of 'em.

Q. Kingsbury Homes?

A. Development loans?

Q. Sir?

A. Development loans, land acquisition?

Q. Financing, terms and conditions in connection with the sale of prefab houses?

A. No, I didn't.

Q. Swift Homes?

A. No. I—we have had some as—some Swift Homes that they wanted us to finance, but I don't recall.

Q. But I mean, do you know what Swift Homes' policy was?

A. No.

Q. Inland Homes?

A. No, I do not.

Q. True Built Homes?

A. No, I don't know.

Q. Richmond Homes?

A. No, I do not.

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Q. Jim Walters Homes?

A. No, I don't.

Q. Peace Woodworking Company?

A. I do not.

Q. General Homes?

A. I do not.

Q. All right. You have testified that as a matter of policy your Company would not make a hundred per cent land loan. Isn't the substantial reason behind that policy that the cost incident to the greater risk might reduce the profits?

A. Well, if you—if you, huh, considered possible loss as reducing the profits that's one of the things that naturally, that you consider.

Q. Now, in 1961, uh, '60 and '61, about what proportion of your total business, that is, your Company, consisted of loans for acquisition and development of land for residential subdivision purposes?

A. Well, actually, ours was insginificant; I would say approximately one per cent.

Q. Not very large?

A. No, sir; not very large.

Q. What other types of lenders did compete or did you compete with for that type of financing; who else

was in the market?

A. The only—

Q. Sir?

A. Well, it would be just the immediate financial institutions in this area, such as other Savings & Loans and the banks—banks would make some acquisition loans because they were short-time loans.

Q. Were any of these lenders located outside of the Louisville area?

A. Not that we had any experience in competing with.

Q. Did you ever finance outside of the Louisville area?

A. No, no; directly, we never did finance outside of the general area of Louisville and Jefferson County.

Q. When did your Association first start making land acquisition loans?

A. We were authorized, in 1959, and I think our first acquisition loan was probably in the latter part of '61 or '62.

Q. Didn't you first start following the land development loan terms after you got into the business?

A. By that, you mean what?

Q. Well, keeping up with the market, the terms and so forth of land acquisition; didn't you really first get into this and start after your Association, your Company began making those loans?

A. My experience in it?

Q. Yes.

A. More or less that was it. Of course, from 1959 on, why, I was familiar with the regulations and of course, we were always looking for opportunities at it.

Mr. Reutlinger: That's it. Ken, we have nothing further. Thank you, Mr. Will.

Mr. Anderson: If the Court please, that completes the supplemental proof of the Plaintiff.

Mr. Reutlinger: If Your Honor please; we would—Mr. Anderson and I would like to talk with the Court briefly about procedural matters.

By the Court: Sure; all right. Well, does this conclude now what we are going to do today and we will be back Monday; is that it?

Mr. Reutlinger: That's one of the things we want to talk about. We may not be back Monday.

By the Court: All right.

(Whereupon, at About the Hour of 3:04 P.M.,

an Adjournment Was Taken, to Reconvene at the Court and Counsel Determine.)

(Reconvened on Tuesday, November 20, 1973, With Appearances at Noted Heretofore, at About the Hour of 9:30 A.M., and the Following Proceedings were Had:)

By the Court: All right, gentlemen.

Mr. Reutlinger: All right; come around Mr. McGlaughlin and this young lady will swear you.

MR. JOHN E. McGLAUGHLIN, called as a witness, by the Defendants, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination

By Mr. Reutlinger:

Q. State your name?

A. John E. McGlaughlin.

Q. Where do you live, Mr. McGlaughlin?

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A. I live at 9807 Stonehinge Way, in Louisville.

Q. And I believe you are presently employed by the Homes Division of the United States Steel Corporation?

A. That's right.

Q. In what capacity?

A. I'm Manager of Accounting.

Q. And how long have you been so employed?

A. Since, uh, August of 1968 with the Homes Division; since 1954 with, uh, United States Steel Corporation.

Q. Generally speaking, and before you went with the Homes Division, what has been your business experience with the United States Steel Corporation?

A. I have been in various accounting capacities with the Steel Company. I have been in four or five locations; started in the Management Training Program and, uh, have gone through most of the levels up through the level of Manager.

Q. I believe the Homes Division is engaged in the manufacture and sale of prefabricated homes, and at this time, uh, apartments; is that correct?

A. That's right.

Q. Are the books of the Homes Division kept

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under your direct supervision and control?

A. They are.

Q. And do those books reflect a separate accounting as to profitability or lack of profitability for the operation?

A. Yes, they do.

Mr. Anderson: Now, anticipating the next question, or because of the last question, we object to any testimony as to figures as to profitability or lack of profitability from this witness on two bases.

Number one, that this Court, in 1970, sustained an objection to such testimony for reasons that are set forth in the Record which I believe the Court has reviewed.

Secondly, uh, we would point out, Your Honor, that after the 1970 trial and jury verdict, uh, a motion for a new trial was made.

(At this point an off-the-record discussion was had, after which the following proceedings occurred:)

Mr. Anderson: As I was saying, Your Honor, following the jury verdict in 1970, the Defendants filed a motion, motion for judgment NOV, and a motion for a new trial. One of the grounds listed in their motion for new trial was that the Court erred, they claimed,

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in refusing to admit certain—to admit evidence offered by them which obviously included the evidence to which we are referring today.

Your Honor, in the brief filed by the Defendants Appellants in the Sixth Circuit following the 1970 trial, uh, the primary thrust of their argument in that brief was that they had been entitled to a directed verdict below, which, of course, the Sixth Circuit rejected and their alternative plea was for a new trial.

They stated at page three of that brief that while Defendants offered evidence disputing both the fact and measure of any damages allegedly incurred by Plaintiff, they

have elected to limit this appeal solely to the issues of liability, i.e., whether any violation of the Sherman Act was shown, and, Your Honor, referring to pages thirty and thirty-one of that brief, uh, they say in the brief, in fact, while erroneously excluded by the Trial Court, evidence was offered by the Defendants, et cetera, pertaining to this particular point, but the point that I am making, Your Honor, is that at no time in the Sixth Circuit was this issue raised as an issue on appeal.

This is a, shall we say "side bar comment" in this brief. So, we respectfully submit that if they wanted to pursue this point following the 1970 trial, it was

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incumbent upon them to claim this as an error on their appeal to the Sixth Circuit.

If we—if we don't have people claiming on appeal whatever basis they have for reversal at the time a matter goes to the Sixth Circuit, Your Honor, and the whole thing is back for later, we could go on in litigation forever.

So, we submit, number one, on the merits of the matter, that this evidence, since the Homes Division is merely a division of the United States Steel Corporation, uh, that evidence of the nature that they are seeking to offer is not admissible and we further submit that, uh, they, in any event, they have waived the point by failing to appeal it to the Sixth Circuit.

Mr. Reutlinger: I can respond to that briefly and then, depending on the Courts' ruling, ask for an avowal. In the first instance, we still adhere to the transfer of profit theory which we feel bears on the matter we hope to produce from this witness.

Secondly, we are now in a new trial position, having prevailed upon appeal, and I think the new trial approaches each matter on its own basis as of that trial.

I don't—obviously, the Court knows what the figures are, having read the avowal in the earlier Record. If

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the Court cares to rule at this time—I see no reason for it to do so, or not to do so.

By the Court: All right.

Mr. Reutlinger: And then we would like to get it in by avowal. Would the Court permit Mr. Flynn to supplement my remarks as to relevancy?

By the Court: Oh, sure.

Mr. Flynn: Your Honor; just to make the Record on this point.

By the Court: Sure.

Mr. Flynn: I would like to add a little bit to Mr. Reutlinger's remarks.

As Your Honor knows, the Complaint alleges, and I believe that the Plaintiff has steadfastly contended throughout all of the stages of this proceeding that the Homes Division's houses were overpriced—were artificially priced.

This issue was first understood by the Defendants to be, in essence, an allegation supporting alleged damages. At the deposition of one Harry Black of the Homes Division, Mr. Anderson, as I believe he has correctly represented to the Court, asked that this information be produced. An objection was entered by the Defendants on the ground that it was highly confidential trade information which

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could be competitively sensitive if opened on the public records.

Mr. Anderson certified the question, but to my knowledge, did not thereafter bring it to the Court. Subsequently, as Your Honor knows, summary judgment was entered in behalf of the Defendants and a petititon for certiorari was granted by the Supreme Court.

At that time, the Majority Opinion, five justices of the Supreme Court, pointed to the allegation in the Complaint that the Homes Division's houses were allegedly overpriced and, to my knowledge, for the first time suggested both to the Plaintiff and the Defendants that this allegation might possibly reflect some possibility of economic power in the Defendant in the credit market.

At that point of time the case was put into a different posture as far as the Defendants were concerned. The allegations of the alleged overpricing of the houses then bore upon the central issue which is the subject of the remand by the Sixth Circuit on this trial, i.e., did the Defendants have economic power over credit sufficient to allow them to appreciably restrain trade in the market for prefabricated houses?

Now, I submit that that allegation by itself is germane, both on what the Sixth Circuit has said in the case,

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and, based upon the Plaintiff's own contentions and, indeed, I think it is instructive that before Judge Shelbourne, in attempting to sustain interrogatories that the Plaintiff had addressed to the Defendant, seeking profit and loss data for the Homes Division, the Plaintiff argued that the profit experience of the Homes Division was relevant to the question of whether or not the houses were overpriced.

As I understand it, the question of whether or not the houses were overpriced is still very much in this case. We agree with the Plaintiff that that being so, the information is relevant—is competent.

Now, we do not claim that those data by themselves are dispositive. I think obviously, the Plaintiff is entitled to and we are entitled to look to other evidence too; what comparative prices were being offered by the competitors for comparable houses and, as Your Honor knows, based upon

the Record made at the first full trial, there is such information in the Record, offered by the Plaintiff's witnesses.

If, in fact, our houses were overpriced and we were using credit to force them on dealers, then the Homes Division would be expected to have shown some profit, if indeed, not abnormally high profits.

In point of fact, if the witness is allowed to

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testify, we can establish that the Homes Division during the entire period relevant to this case not only essentially showed uninterrupted losses, but that those losses far exceeded the modest profit that was shown by the Credit Corporation.

Now, in addition, the Plaintiff has contended, and, as we understand the case, still contends today that the Homes Division guarantee or underwriting of the Credit Corporation, proves that the Credit Corporation had some economic power or advantage over credit that was not enjoyed by other lenders in the credit market.

The guarantee, according to the Plaintiff's argument, gave Credit Corporation this kind of economic advantage because it couldn't incur loss on special land financing of the type that is directly involved in this case, but again, we point out that at all times relevant, the Homes Division showed substantial losses which far exceeded any profit that was shown by the Credit Corporation.

Now, on these facts, we urge that it is clear that the Homes Division could not have transferred any particular power to the Credit Corporation even if that were relevant, uh, a relevant issue to the per se time concept.

We think, in addition, that the Home Division profit and loss data are revelant in a different context.

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The Plaintiff, in addition to alleging a per se time viola-

tion of Section One of the Sherman Act, has at all times, and we understand still urges that apart from the per se rubric, there is here sufficient evidence to sustain by the Rule of Reason Standard a violation of Section One of the Sherman Act, i.e., that there was a combination between the Defendants in unreasonable restraint of trade, but further, that there was an alleged violation of Section Two of the Sherman Act, a conspiracy to monopolize.

As Your Honor knows, certainly the Section Two charge, the conspiracy to monopolize, requires evidence of a specific intent to acquire monopoly power. We submit that clearly profit and loss data showing substantial losses far exceeding any countermanding profit that the Credit Corporation could have made is germane as to whether or not these Defendants could have possibly been foolish enough to have an intent to monopolize the Homes, or the Prefabricated Homes market.

It would be like the sparrow saying he's going to monopolize air traffic. I advert again, Your Honor, to the majority opinion of the Supreme Court. As you will recall, Justice Black, for four other Justices and himself, there said that, "In analyzing the Section One allegations

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in this case upon a full trial the Defendants might show that the Credit Corporation does not have any competitive advantage and that the arrangement with the Plaintiff served only legitimate business purposes."

We think, again, that this profit and loss data goes to that point. It shows that there could have been no predatory subsidizing of unfairly low credit extended as a means of foisting the Homes Division's houses upon the Plaintiff, or any others similarly situated.

We urge Your Honor that the Homes Division's dismal loss record which would be established by the testimony

through this witness is wholely inconsistent, first with the specific intent to monopolize or acquire monopoly power which is necessary to prove the Plaintiff's allegation of a violation of Section Two of the Sherman Act, but that in addition, it is relevant to the reasons we've articulated here on the per se, and Rule of Reason contention that the Plaintiff makes in support of its claims that the Defendant violated Section One of the Sherman Act as well. Thank you.

By the Court: Well now, where are you left for not pursuing my previous ruling on appeal? That was the time I needed the advice of the Sixth Circuit.

Mr. Flynn: Your Honor; we did the best we could to bring to the Court of Appeals'

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attention this particular ruling. I think, as is not uncommon in a remand situation of this kind, the Court looked at the broad outlines of the cases, held that the Plaintiff had established a prima facie case and was entitled to a full trial, even though it was not proper to have directed a verdict on the liability issues.

The fact that the Sixth Circuit opinion does not focus on this particular appeal, this particular aspect of the appeal, I think is not dispositive. In addition, I would submit that we are in a somewhat different situation; this, in essence, is to be a new trial, even though, as Your Honor knows, the events of the last ten days have changed the nature of this new trial.

Rather than trying the case before a jury with the same witnesses and any additional witnesses testifying live, the records from the prior trial are being incorporated into the record of this trial, but I submit that we should no more be precluded from offering this—

By the Court: (Interrupting) Oh, I'm not precluding you based upon the record of the prior trial, uh, the fact

that I let it in in the prior trial. The thing that bothers me is that if I had error in this respect, I can't justify 'em not saying so when they, on the other hand, say, "Leave the damages like they are." Now, if this

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a serious, prejudicial error to you, I can't believe that they would have done that. I can't believe that they wouldn't have, uh, corrected it if you had vigorously asserted it to 'em. Now, you've got some mention in there but then, later, you qualify that to some extent.

Mr. Flynn: We spent three quarters of a page on the point, Your Honor.

By the Court: Sir?

Mr. Flynn: We spent three quarters of a page—

Mr. Reutlinger: Pages thirty and thirty-one of the brief to the Sixth Circuit. Mr. Anderson made reference to it, the page numbers. There is no point in reading that to the Court.

By the Court: Yes.

Mr. Reutlinger: But it's there.

Mr. Anderson: Judge, the burden is upon the Appellant to establish, initially, the issues on which he is basing his appeal, uh, under our Federal Rules concerning appeals. They did not establish anywhere in their brief that this was an issue that they were raising on this appeal, and, uh, they mentioned it in their brief.

Now, comments in a brief that, uh, somebody made

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a mistake; that a judge made a mistake in the course of argument of the case does not bring that issue up to an Appellate Court for that Court's review, uh, and this is why I'm saying that they waived this point by, uh, by not appealing this issue if they felt it were prejudicial error;

it's not listed in their statement of issues; it's only referred to in the text of their argument.

Mr. Reutlinger: Court please, Mr. Anderson, of course, is not—he's correctly reciting facts, however, the basic issue on appeal was the prejudice to the Defendants of the Court giving a directed verdict and that was the whole case. We did split, of course, the damage part.

The Court of Appeals has said we are entitled to a new trial. In effect, we start all over again on the narrow issue, or curtailled issue of liability.

By the Court: Yes.

Mr. Reutlinger: This is one of the elements of the proof, we feel, is proper. We could, of course, spend all morning and I don't think the Court is compelled to rule at this time since we are sitting without a jury. We would like to get it in the record, if not admitted, by way of an avowal, and I think the Court can dispose of the ancillary question, the evidentiary

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question at some future time unless the Court is prepared to do so at this time.

Mr. Flynn: Your Honor, might I just briefly add if I correctly infer from what Mr. Anderson is saying, he seems to be saying that this evidence goes to the proof of damages as to which we did not appeal and as to which the prior verdict of the jury has already established damages, assuming that liability is found.

This, as Mr. Reutlinger—

Mr. Anderson: (Interrupting) Mr. Flynn, I didn't say that and I don't want to debate that point.

Mr. Flynn: All right; I just wanted to make—all right, fine. I just wanted to make clear that this evidence which is relevant, uh, we urge that this evidence which is relevant and clearly relevant to the issue of liability as framed by

the Plaintiff's Complaint and his contentions, and in addition, I would point to the fact that the Sixth Circuit in its opinion in remanding this case concluded with a lengthy footnote in which they pointed out, and I believe Mr. Anderson has cited this particular footnote to the Court on prior occasions, that in essence, the jury—now we have a different finder of fact, but in any event, the finder of

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fact was to have before it all of the evidence and was not to have any single standard imposed upon it in determining liability.

The conclusion sentence of that footnote is:

"Admittedly, this is a standard which must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence, some of which we have commented upon, free from the limitations of an arbitrary definition."

By the Court: They wear that word "arbitrary" out when they write about me, don't they?

(General Laughter At This Point.)

Mr. Reutlinger: Is the Court referring to some Bankruptcy proceedings I read of in the newspaper yesterday?

By the Court: Yes. Well, let me study about this for about five minutes.

(Whereupon, at about the hour of 9:50 A.M., a recess was taken to about the hour of 10:00 A.M., whereupon the following proceedings occurred:)

By the Court: Well, gentlemen,

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let me say this; I—I hate to kill any milk cows for table meat, but it looks to me like that your theory in support of this was not as cogently urged upon me the last time as it is this time and then, secondly, I had a jury the last time

and, uh, the admission of this evidence, I thought, where you just were reaching in and taking a division of a corporate entity might really confuse them, but here where we are trying it before the Court, and the Court of Appeals has said that when we are trying these cases before the judge alone that he should not be so technical about enforcing strict rules of evidence, but to go ahead and receive 'em, and, uh, I'm going to overrule the objection and let you do it.

Mr. Reutlinger: All right, sir.

Q. (By the Reutlinger) Mr. McGlaughlin, is the fiscal year of the Manufacturing Homes Division the same as the calendar year?

A. Yes, it is.

Q. At my request, and using the books under your control, did you prepare and bring with you a memorandum for the profit or loss for the years 1960, '61 and '62?

A. I did.

Q. Uh, you may refer to any notes you have to refresh your recollection, and tell us whether in 1960, the

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operation was profitable, or if there was a loss?

A. In the year 1960, the net loss for Homes Division was $53,241.

Q. And can you give us the same information for 1961?

A. For the year 1961, the net loss for the Homes Division was $574,486.

Q. And can you give us the same information for 1962?

A. For 1962, the net loss for the Homes Division was $617,948.

Mr. Reutlinger: You may ask him, Mr. Anderson.

Testimony of Mr. John E. McGlaughlin

Cross Examination

By Mr. Anderson:

Q. Mr. McGlaughlin, you don't have the books and records of the Homes Division with you here; is that correct?

A. That is correct; I don't.

Q. You are aware of the fact that the prefabricated house packages manufactured by the United States Steel Corporation's Homes Division in this period of time to which you have referred contained, uh, various steel

components?

A. Yes, I'm generally aware of that. I'm not familiar with the operations back in those years, but, uh, yes, there were steel components involved in the packages.

Q. All right. Obviously, that was one of the purposes of the Homes Division being in existence, was to get as much steel into the packages as they could; it's a matter of common knowledge, isn't it?

A. I don't know that that is a fact.

Q. All right. Well, it's established elsewhere in the Record, sir.

(Witness Nodded Head Affirmatively.)

Q. Now, can you tell us the volume of the Homes Division's purchases of steel from the United States Steel Corporation, the parent, of which it is a division, in 1960, '61 and '62?

A. No, I can't tell you that.

Q. Can you tell us how much profit the United States Steel Corporation had in the steel products which it, uh, sold or transferred over, or whatever it did on the books of the Homes Division?

A. No.

Mr. Anderson: That's all we have.

Testimony of Mr. John E. McGlaughlin

Mr. Reutlinger: This witness excused?

By the Court: Yes; you may stand aside, Mr. McGlaughlin; thank you.

Mr. Reutlinger: If Your Honor please; I spoke with Mr. Anderson about this. We want to get into this trial record other matters which are in the general record.

Unless Mr. Anderson takes a contrary view, I see no reason to actually sit here and read portions of depositions I would make reference to, seek its admissibility and then the Court would know to what we are referring when we brief, and of course, it would be in the record.

For the Court's convenience I have made xerox extracts and Mr. Anderson has a copy, which I will furnish the Reporter. We would like the trial record to reflect that certain material which we have designated on pages forty-three and forty-four, namely, Questions 230 through Question 233, of Mr. Fortner's deposition of April 22nd of 1970, and further, in that deposition, page fifty-nine through page sixty, Questions 313, which is only one question, concluding on the following page, be a part of the trial record. We also would want the Fortner affidavits

which were earlier made and which were part of the Supreme Court Joint Appendix found at page 289(A), and 294 to be part of this trial record.

We would also—

Mr. Anderson: I think really, for you to be accurate it's through page 294; the second one starts on 292.

Mr. Reutlinger: Yes, I think you are right; commencing on page 292. We also would want part of the trial record from the Lang deposition, pages 15 through 17, line twenty through line eleven.

We would also want part of the trial record portions of the Dyas deposition, page 99, line twenty-three, page 101, line seven, page 105, line nineteen, through page 109, line seven; page 121, line nineteen, through page 125, line twenty-four.

Now, Mr. Flynn has said I made an error in the first reference to the Dyas deposition; it would be page 99, line twenty-three, through page 101, line seven.

Plaintiff served answers to certain interrogatories in February of 1964. We would want interrogatories and answers through sub-paragraph (A), and (4); subparagraph (D)—

Mr. Anderson: (Interrupting)

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Again, Mr. Reutlinger, I have no objection to your introducing these, but that was in, I believe, November of 1962, sir, that we served those answers and not February of '64.

Mr. Reutlinger: This may be. We have them designated. I could be wrong on the dates and I have, as I say, an extract for the Court.

And, finally, the Plaintiff served Answers to Interrogatories in January of 1973. Those answers were used in cross examining witnesses last Friday. We would like those interrogatories, the answers to them, to be part of our trial record as supplemented by Mr. Anderson's letter to me under date of November 9, 1973, which dealt with the enlargement of his Answers to Interrogatories concerning Dr. Masten's testimony, and I have here—

By the Court: Well now, let me ask you this, gentlemen would it not be better that you all enter into and file with the Court stipulation of exactly what, in addition to the prior trial record, these things are so that I have them

before me and don't have to wade through, uh, or wait 'till he types all this up, you see.

Mr. Reutlinger: All right, yes, sir.

By the Court: And then, such of those things as you have photostated, if you would like to

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do that, then I know that I've got the entire situation right at hand.

Mr. Reutlinger: All right, sir.

By the Court: Rather than have to go through a great deal of bulky paper to dig it out.

Mr. Reutlinger: I've got it. Do I hear any objection to that, Mr. Anderson?

Mr. Anderson: No.

By the Court: I believe you can do that.

Mr. Reutlinger: Perhaps this afternoon.

By the Court: And then I won't have to be hunting for his letter to you of such and such a date.

Mr. Reutlinger: No, no; all right, sir; we'll do that.

Mr. Anderson: Your Honor; since he has referred to my letter, uh, there seems to have been an innuendo raised that I held something back on the Defendants. I think Dr. Masten clarified that, but I will either, as I stated Friday, I'll be perfectly happy to me put under oath and I will state to the Court, as an officer of the Court that when I met with Dr. Masten the week before

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this trial was to begin this was the first time that the subject matter to which Mr. Reutlinger alluded was brought up by Dr. Masten.

I, quite frankly, merely felt that it was an extension of the information we have previously furnished the information we had previously furnished the Defendant but, as I point out in that letter, and in a great deal of caution, I feel, we did write the letter to supplement the record.

Proceedings

Mr. Reutlinger: I don't think we take much issue with that, Judge. I think Mr. Anderson is very courteous in getting it to us as promptly as he did.

Now, Judge, we had Mr. McGhee scheduled for today, as you knew, and we prepared testimony and got copies to Mr. Anderson: We felt we needed experts, certainly, if we were faced with a jury trial.

Of course these are McGhee and Geiss, which we have had on the book for some while and because we were uncertain, obviously, before we heard Dr. Masten, what his testimony would be precisely, we wanted someone to sit with us to advise us.

Yesterday afternoon after Mr. Buchanan got here from Pittsburgh we met and concluded that we would not present either of our experts. We feel that the Record is

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in such a position that we like it and I informed Mr. Anderson yesterday afternoon so that he didn't spend all night planning his cross-examination, and unless you have some objection, I think we announce that this is the Defendants' case in chief.

Now, there are some procedural matters and I would imagine the Court, Mr. Anderson and I can go into, either here, or in Chambers as to further proceedings and we will do that at the Court's pleasure.

By the Court: Well, we can go right in there and do that then. Do you have anything further to offer?

Mr. Anderson: Your Honor, uh, for the completion of the Record, I would like to state first of all that we reserve any comments that we care to make at the time the matter is argued, or briefed about the presence or absence of witnesses listed by the opposition.

For purposes of the Record we would like to, since Mr. Dyas' deposition has been referred to by the Defendants, we would like to offer, which we will include in the stipula-

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tion to which the Court has alluded, but just so the Record at this point will be clear, we want to offer from page 92 of Mr. Dyas' deposition, starting at line eighteen, through line three on page 93—that's just

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two questions and answers, Your Honor.

Mr. Reutlinger: I'll put that in.

By the Court: Put that in the stipulation.

Mr. Reutlinger: Yes, sir.

By the Court: That's fine.

Mr. Anderson: We have nothing further, obviously, Judge, when since they didn't call their experts, we can't very well call Dr. Masten in rebuttal.

By the Court: Well, let's go into Chambers then.

Mr. Reutlinger: Judge, the Court did receive the three volume appendix to the Sixth Circuit?

By the Court: Right; I've got that.

Mr. Reutlinger: This, of course, is the basic tool with which we will work in supplementing.

By the Court: All right; fine; then let's go into Chambers and we can work out a schedule about how you want to handle it.

(Whereupon, at about the hour of 10:15 A.M., an adjournment was taken.)

CERTIFICATE

I, Charles L. Sterling, Official Court Reporter for the United States District Court of the Western District of Kentucky, at Louisville, Kentucky, do hereby certify that the entire proceedings in the above-captioned case were taken down by me at the times and places stated in the caption.

That the foregoing "Transcript of Proceedings" is a true and accurate transcript of my stenographic notes so

taken, and that said transcript was prepared under my supervision and direction.

I further certify that I am not related by blood or marraige to any of the parties hereto and that I have no interest in the outcome of the captioned cause.

Given under my hand as Official Court Reporter, this the 5th day of December, 1973, at Louisville, Kentucky.

(Official Reporter)

In the
UNITED STATES DISTRICT COURT
For the Western District of Kentucky
At Louisville
Civil Action No. 4392-G

Fortner Enterprises, Inc. - - - - Plaintiff

v.

United States Steel Corporation and
U. S. Steel Homes Credit Corporation - Defendants

JUDGMENT—Entered September 20, 1974

This Court interpreting the actions of the Sixth Circuit Court of Appeals as having by its Opinion appearing at 453 F. 2d 1095 (1971) and by its Judgment issued as Mandate on June 28, 1972, to have set aside only that portion of this Court's Judgment previously entered on November 23, 1970 (bearing interest from September 18, 1970) concerning certain liability issues but leaving intact that portion of said Judgment establishing the amount of plaintiff's damages trebled, attorneys' fees through the 1970 trial, and costs of said Opinion and Mandate of the Sixth Circuit Court of Appeals having thereby limited retrial to certain liability issues and thus prohibited plaintiff from retrying its damage issues and thereby having liquidated plaintiff's damages, the Court find that interest should apply to said treble damage award, attorneys' fees and cost from September 18, 1970, and

The parties hereto having agreed that this Court should act as Finder of Fact and having waived a jury trial on

those liability issues to be re-tried and this Court having entered its Findings of Fact and Conclusions of Law on August 13, 1974, finding in plaintiff's favor on said issues of liability, and having further found that plaintiff is entitled to an additional award of attorneys' fees for work done since the June, 1970 trial of this action, it being believed by us that the subsequent appeals would have occurred regardless of whether this Court gave plaintiff a directed verdict in 1970, or whether a jury had found for plaintiff on liability in 1970, and the Court being otherwise sufficiently advised,

It Is Hereby Ordered And Adjudged that the Judgment entered on November 23, 1970, in favor of Plaintiff, Fortner Enterprises, Inc., against the Defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, for trebled damages, attorneys' fees and costs in the sum of $427,016.75, with interest thereon at the rate of 6% per annum from September 18, 1970, until paid, is in full force and effect.

It Is Further Ordered And Adjudged that Plaintiff, Fortner Enterprises, Inc., have Judgment against the Defndants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, for supplementary attorneys' fees since the June, 1970 trial in the amount of $32,500.00 with interest thereon at the rate of 6% per annum from the date of entry hereof.

It Is Further Ordered And Adjudged that Plaintiff, Fortner Enterprises, Inc., have Judgment against the Defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, for its assessable costs incurred since November 23, 1970, of $2,330.71, with interest thereon at the rate of 6% per annum from date of entry of this Judgment.

This is a final Judgment, there being no just cause for delay.

(s) James F. Gordon
United States District Judge

September 19, 1974

Copies to:
Mr. Kenneth L. Anderson
Mr. A. Scott Hamilton, Jr.
Mr. Albert F. Reutlinger

DEFENDANTS' MOTION PURSUANT TO RULE 59 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants, by counsel, pursuant to Rule 59 of the Federal Rules of Civil Procedure.

1. Move the court to set aside the judgment entered September 20, 1974 and thereafter for a new trial on the grounds that:

(a) The court's Fndings of Fact, as same relate to the issue of economic power and the issue of an attempt to monopolize the housing market are clearly erroneous.

(b) The court's Findings of Fact, as same relate to sufficient economic power in the money or credit market as an attempt to monopolize the housing market are against the weight or preponderance of the evidence.

(c) The court's Conclusions of Law arein error, in that the court has misconstrued both Fortner Enterprises v. United States Steel Corporation, 394 U. S. 495 and United States Steel Corporation v. Fortner Enterprises, Inc., 452 F. 2d 1905, as same pertain to the issues of defendants' economic power in the money or credit market or the claimed attempt by the defendants to monopolize the housing market.

(d) The court's Conclusions of Law that there was an illegal conspiracy to monopolize the housing market, is not supported by any autority and is contrary to law.

Defendants' Motion Pursuant to Rule 59, etc.

2. In the alternative and for the reasons stated in Section 1 above, move the court to amend the judgment entered September 20, 1974 so that as amended it would dismiss the complaint (and as amended) against the defendants.

3. Should the court overrule Parts (1) and (2) of this motion, then the defendants, in the alternative move the court to amend the judgment entered September 20, 1974:

(a) So that no interest will attach until September 20, 1974.

(b) So as to remove from the allowance of interest the figure of $186,400 representing the trebled portions of the damages.

(c) So as to remove from the judgment the allowance of an additional attorneys' fees for plaintiff's attorneys, in the amount of $32,500.

With leave of court and in accordance with an Agreed Order tendered herewith, defendants will submit their memorandum in support of the foregoing motion.

(s) Albert F. Reutlinger
501 South Second Street
Louisville, Kentucky 40202
Attorney for Defendants

CERTIFICATE

I certify that a copy of this pleading was delivered this 27th day of September, 1974 to the office of Mr. Kenneth L. Anderson, Attorney for Plaintiff, 1805 Kentucky Home Life Building, Louisville, Kentucky.

(s) Albert F. Reutlinger

ORDER—Entered October 30, 1974

The Court, having considered defendants' motion pursuant to F.R.Civ.P., Rule 59, to set aside the judgment entered September 20, 1974, and thereafter for a new trial, or, alternatively, to amend said judgment so as to dismiss the plaintiff's complaint against defendants, or, alternatively, to amend said judgment so that (1) no interest will attach until September 20, 1974, and (2) to remove from the allowance of interest the figure of $186,400.00 representing the trebled portion of the damages, and (3) to remove the allowance of additional attorneys' fees in the amount of $32,500.00, and the Court having reviewed the plaintiff's and the defendants' memoranda with respect to said motion, and the Court being duly advised,

It Is Hereby Ordered that the motion and alternative motions, as stated above, of the defendants be, and hereby are, Denied.

October 29, 1974

/s/ James F. Gordon
United States District Judge

Copies to:
Counsel of record.

NOTICE OF APPEAL

Notice is hereby given that United States Steel Corporation and U. S. Steel Homes Credit Corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 20th day of September, 1974.

/s/ Albert F. Reutlinger
501 South Second Street
Louisville, Kentucky 40202
Attorney for Defendants

CERTIFICATE

I certify that a copy of this Notice of Appeal was mailed this 20th day of November, 1974 to Mr. Kenneth L. Anderson, Attorney for Plaintiff, 1805 Kentucky Home Life Building, Louisville, Kentucky.

/s/ Albert F. Reutlinger

REQUEST FOR TRANSCRIPT, PURSUANT TO RULE 10, RULES OF APPELLATE PROCEDURE

The appellants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, hereby order from the court reporter the entire transcript of the proceedings for the purposes of their appeal.

/s/ Albert F. Reutlinger
501 South Second Street
Louisville, Kentucky 40202
Attorney for Appellants

CERTIFICATE

I certify that a copy of this pleading was mailed this 20th day of November, 1974 to Mr. Kenneth L. Anderson, Attorney for Appellee, 1805 Kentucky Home Life Building, Louisville, Kentucky.

/s/ Albert F. Reutlinger

ORDER EXTENDING TIME FOR TRANSMISSION OF RECORD

Counsel being in agreement and the court being advised, the time within which the clerk may transmit the record herein to the United States Court of Appeals for the Sixth Circuit is extended thirty days to and including January 29, 1975.

/s/ James F. Gordon
Judge

/s/ Kenneth L. Anderson
Attorney for Plaintiff

/s/ Albert F. Reutlinger
Attorney for Defendants

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 75-1208

FORTNER ENTERPRISES, INC. - - *Plaintiff-Appellee*

v.

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORP. - *Defendants-Appellants*

APPEAL from the United States District Court for the Western District of Kentucky, Louisville Division

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OPINION—Decided and Filed October 3, 1975

Before: WEICK and MILLER, Circuit Judges, and CECIL, Senior Circuit Judge.

MILLER, Circuit Judge. This private antitrust action is before us on appeal for the third time in twelve years. The action involves a tying arrangement in which U. S. Steel tied the purchase of prefabricated houses to credit given to finance the acquisition and development of land on which they were to be built.

The Homes Division of U. S. Steel manufactures prefabricated houses and sells them through builder-dealers like the plaintiff. In 1954 its wholly-owned subsidiary, the Credit Corporation, was founded to provide financial assistance to those builder-dealers who were unable to obtain suitable financing from more conventional sources. Initially, the Credit Corporation's assistance was limited to

financing purchase and construction of the houses, but it later was extended in some cases to acquisition and development of land on which the houses were to be built. In 1958 a program of "special assistance" was begun whereby credit was made available in certain high risk situations without regard to "conventional or conservative patterns but within the bounds of prudent business judgment." The Homes Division guaranteed these special loans to protect the Credit Corporation from loss. The purpose of Credit Corporation's regular and special financing was always to assist the Homes Division's house sales.

In 1959 the Homes Division became interested in land available for development in an existing subdivision in Louisville, Kentucky. U. S. Steel initiated discussions with one A. B. Fortner, a successful real estate developer, looking toward entering the Louisville prefabricated housing market. The negotiations resulted in an agreement whereby Fortner's wholly-owned corporation, Fortner Enterprises, Inc., would acquire a portion of the subdivision and would become a franchised builder-dealer of the Homes Division product. The Credit Corporation would extend credit to the plaintiff for acquisition of 187 lots in the subdivision and development of the undeveloped lots conditioned on the construction, on each of the lots purchased by plaintiff, of a prefabricated house of the Homes Division of U. S. Steel. In addition to covering the cost of acquisition and development of the lots, a portion of the initial loan was to cover purchase and construction of the houses. The land loan equalled 100% of the cost of the land acquisition and development. Plaintiff's land financing was in the "special assistance" category.

Plaintiff later began to experience difficulties with U. S. Steel products, including the omission of parts and the delivery of defective parts. Homeowners, who had pur-

chased the homes from Fortner began to complain. About this time Fortner requested (and received on the same terms) additional financing for the purchase and development of more lots in the subdivision on which Homes Division houses were to be placed. On August 2, 1961, to secure the additional financing Fortner executed a land and mortgage note and a construction note. After experiencing further difficulties with the prefabricated houses and running out of cash, Fortner requested that he be relieved of the requirement that the financing be used for the construction of Homes Division houses. The request was refused although Fortner was advised that he was free to refinance the Credit Corporation's loan and obtain houses from other sources. In July, 1962, he instituted this action, charging that defendants U. S. Steel and Credit Corporation had violated Sections 1 and 2 of the Sherman Act.

The district judge granted summary judgment in favor of defendants. This Court affirmed without opinion. The Supreme Court reversed in a 5-4 decision and remanded for trial. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495 (1969). Following a one-month jury trial, the district court directed a verdict for plaintiff on the issues of liability under the Sherman Act. Defendants' motion for a directed verdict was denied. The question of damages was submitted to the jury which returned a verdict of $93,200. This amount was trebled by the court in accordance with the provisions of the Sherman Act. The defendants did not appeal the damages issue, but limited their appeal to the issue of liability. This Court reversed the district court's judgment directing a verdict for plaintiff. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F. 2d 1095 (6th Cir. 1971), *cert. denied*, 406 U. S. 1019 (1972). Although we found that the agreement was in fact a tie-in and that a not insubstantial amount of interstate commerce in the tied product was affected, we remanded for trial on the issue of sufficient economic power.[1]

The parties on remand agreed to waive a jury trial and to submit the liability issue to the court on the evidence previously taken, as supplemented by some additional evidence. Adopting the findings of fact and conclusions of law proposed by plaintiff, the court found the liability issues under Sections 1 and 2 of the Sherman Act in favor of the plaintiff. Judgment was entered accordingly.

Defendants advance a number of arguments on appeal. The most significant of these involves the question of whether the district court applied the proper legal criteria for determining the economic power issue. Two other arguments will require consideration.

Defendants challenge the district court's findings on the question of economic power as being clearly erroneous.[2] On this issue plaintiff relies heavily on its view that the Credit Corporation loans were uniquely favorable to establish that defendants possessed the requisite economic power in the credit market. Defendants argue that the character-

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[1]The two elements required for a finding that a tying arrangement is a per se violation of Section 1 are set forth in *International Salt Co.* v. *United States*, 332 U. S. 392 (1947): (1) a party (seller) must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied product and (2) a not insubstantial amount of interstate commerce must be affected.

[2]We consider the clearly erroneous standard the proper standard for defining the scope of appellate review of factual findings by the district court. Defendants contend that more careful scrutiny of the record is required when a district judge, as here, adopts the proposed findings and conclusions of one party almost verbatim than when his findings clearly reflect the court's own thought processes. They also point out that district court's findings are less conclusive when, as in this case, they are not based upon an assessment of witness credibility. While there may be some merit in both arguments, *see, e.g.*, *A. J. Industries, Inc.* v. *Dayton Steel Foundry Co.*, 394 F. 2d 357, 361-62 (6th Cir. 1968); *Roberts* v. *Ross*, 344 F. 2d 747, 752 (3rd Cir. 1965); *Louis Dreyfus & Cie.* v. *Panama Canel Co.*, 298 F. 2d 733, 738 (5th Cir. 1962), departure from the clearly erroneous standard would not be required.

ization of the loans here as 100% financing is incorrect because this figure was used to refer to 100% of Fortner's cost to acquire and develop the land, while the generally accepted meaning of a loan's percentage is the proportion it bears to the value of the land. They contend that the value of the lots acquired by plaintiff substantially exceeded the loan commitments and that there was thus no 100% financing. A careful examination of the record indicates that the district court's determination that these loans were unique because they were 100% land acquisition and development loans is not clearly erroneous. The testimony of plaintiff's witnesses does not suggest that any of them misunderstood the context in which the 100% figure was used in this case. Since these witnesses were able to testify that a loan for 100% of the cost to acquire and develop property was unique at that time in the Louisville area, it is irrelevant that the percentage of the loan might be characterized in another way.

Defendants also claim that even if the evidence establishes that these were 100% loans which were unavailable elsewhere, the record fails to establish that the loans to plaintiff were more favorable than those available from other sources when all of the conditions of the respective loans are compared. When this case was before this Court in 1971, we recognized that the amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F. 2d at 1101. While the testimony did not compare every relevant term of plaintiff's loans with terms of loans available elsewhere, we conclude that there was enough evidence[3] from which

[3]This evidence included plaintiff's own conclusion that the loan was uniquely favorable, testimony by representatives of other lending institutions comparing the terms and conditions of loans they were making at this time to those of plaintiff's loans, and the conclusion of plaintiff's expert witness that the loans were uniquely favorable.

the district court could properly infer that the loans to plaintiff were uniquely favorable and that its findings in this respect are not clearly erroneous.

Defendants urgently insist that the district court failed to apply the proper criteria in determining that the defendants had sufficient economic power in the credit market to establish the *per se* illegality of the tying arrangement. The appropriate legal standard for this case was defined by the Supreme Court in its opinion reversing the original granting of summary judgment in this case in defendants' favor. *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 394 U. S. 495 (1969). The same standard was indicated by this Court's opinion reversing the district court's granting of a directed verdict for the plaintiff on the issue of liability. *Fortner Enterprises, Inc.* v. *U. S. Steel Corp.*, 452 F. 2d 1095 (6th Cir. 1971).

In its opinion, the Supreme Court stated that "the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers in the market." 394 U. S. at 504. Then, in holding that plaintiff was entitled to a trial under this standard, the Court said that the higher price charged for U. S. Steel homes as compared to the price for similar models of other manufacturers "may suggest that respondents had some special economic power in the credit market." *Id.* In addition, the Court pointed to the claim that the loan was uniquely advantageous to plaintiff as possibly reflecting some sort of economic advantage of U. S. Steel over its competitors. *Id.* at 505-06. However, the Court rejected the argument that economic power could be inferred simply because the terms of a loan are unique. *Id.* at 505. In a footnote which has received much attention the Court went on to say that "uniqueness confers economic power only when other competitors are in some way prevented from

offering the distinctive product themselves." *Id.* at 505, n. 2. The Court noted that possible barriers could be legal, physical, or economic, as when the seller has a cost advantage in producing the tied product. *Id.*

When the case was before this Court after the directed verdict, we emphasized the Supreme Court's rejection of the argument that uniqueness alone constitutes proof of sufficient economic power and discussed, in light of the evidence presented, the factors which the Court thought would show economic power because they would prevent others from making similar loans. 452 F. 2d at 1101. We concluded that plaintiff had made a prima facie case of economic power, but was not entitled to a directed verdict because of varying inferences which could be drawn from the record. *Id.* at 1097, 1101-03. Pointing out that the Supreme Court did not determine precisely what effect the comparatively higher prices for the Homes Division houses should have, we said that the probative value of this evidence should be determined by the trier of facts. *Id.* at 1103. We also noted that the Supreme Court in *Fortner* did not hold that "acceptance of the tie-in by customers without more is proof of economic power," since if this had been the holding, Mr. Justice Black hardly would have been required to discuss the economic power issue so exhaustively. *Id.* In a footnote, we also stated that we had not discussed all of the evidence bearing on the economic power issue which should be considered by a jury on remand, and further that the economic power standard "must vary in application from case to case, but the jury should be free to determine the issue on the basis of the entire evidence, . . . free from the limitations of an arbitrary definition." *Id.* at 1103, n. 4.

These two opinions, considered together, show that plaintiff may not rely on uniqueness alone as a source of

economic power in the credit market. Rather, as the Supreme Court opinion makes clear, if uniqueness is the only indication of economic power relied upon, a plaintiff must show that competitors are prevented in some way from offering the unique product themselves. 394 U. S. at 505. However, if other factors in addition to uniqueness are relied upon as indicators of economic power, the requirement of showing that competitors are prevented from offering the product is less stringent. In this type of situation the entire range of evidence—evidence of uniqueness as well as other relevant evidence—should be considered by the trier of the facts.

Thus, in this case, plaintiff might previal even if it failed to show that other lending institutions were prevented from offering a loan on equally favorable terms, if it could show sufficient economic power by other evidence. Other evidence might include such factors as the non-competitive higher price of the tied product or the number of buyers accepting the tie-in—both of which were mentioned by the Supreme Court and by this Court. 394 U. S. at 504; 452 F. 2d at 1103. When a plaintiff does not rely on uniqueness alone, it is the overall sufficiency of the evidence which is controlling. We have recognized that customer acceptance of the tie-in without more is not sufficient to show economic power and have suggested that a non-competitive price is of uncertain probative value. 452 F. 2d at 1103. Yet, a number of such factors considered together may be sufficiently probative.

Here we must determine whether the district court applied proper criteria in its findings with respect to the element of economic power or leverage. If plaintiff relied solely on claims of uniquenesss of the loans, its case for establishing that defendants had economic power in the credit market on the facts of the present case would be quite weak. Neither legal barriers nor a cost advantage,

the two factors mentioned by the Supreme Court, were clearly shown to have prevented other lenders from making these loans. While the court below took notice that national banks and federal savings and loan associations were legally prohibited from making 100% loans, there was no similar evidence as to the many other types of lending institutions. Nor was there evidence that any lender was prohibited from varying other terms of loans so as to offer equally favorable financing. Although there was some evidence relevant to the existence of a cost advantage, the trial court failed to make any findings on this issue and plaintiff does not contend on appeal that a cost advantage was established. Indeed, the district court's findings suggest that, except for national bank and federal savings and loan associations, other lending institutions were not making such high percentage loans only because of their unwillingness to take the risk involved.

Plaintiff argues, however, that uniqueness did establish economic power in this case because other lending institutions in Louisville were not making loans at that time comparable to those made to plaintiff. It is insisted that the reasons such loans were not made is irrelevant. We must reject this argument and agree with defendants that the proper concern is not availability of the loans but the ability of other lenders to make them.

Since, however, the evidence offered by plaintiff to show economic power is not limited to the loan's uniqueness, the trial court was free to evaluate the other evidence along with the evidence of economic power derived from uniqueness in determining that defendants had sufficient economic power in the credit market appreciably to restrain free competition for prefabricated houses. Other evidence indicated that there was a substantial volume of business involving the tied product, that an appreciable number of customers accepted the tied product, and that the Homes

Division houses cost $455 more than comparable homes. It is clear from the trial court's findings and conclusions that such evidence was evaluated. For example, in weighing the evidence, the district court stated:

> Millions of dollars of loans were made under the special financing category as identified in the Underwriting Agreement filed in this case. All of those loans contained the tie-in provisions. The Credit Corporation thus utilized very effectively the special financing program to enable the Homes Division of United States Steel Corporation to sell millions of dollars of prefabricated houses. This is one of the elements of evidence establishing the economic power or leverage of the Credit Corporation. The fact that the Homes Division was able to obtain a higher price for its prefabricated package in the same condition of a conventional house is again evidence of the Credit Corporation's leverage, or economic power.

We conclude that, despite the district court's failure to find the factors suggested by the Supreme Court which would allow uniqueness to be relied upon as the only source of economic power, plaintiff presented other evidence from which the requisite economic power or leverage could properly be inferred.

Finally, defendants contend that there was no violation of Section 1 because the record shows that no competition in the tied product was actually foreclosed.[4] They base this contention on testimony of Fortner which, as they read it, would indicate that without the financing here, Fortner

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[4]The Supreme Court and this Court, while addressing themselves primarily to the substantiality of the amount of competition foreclosed, evidently felt that there was no problem in determining that foreclosure of competition had occurred. However, as defendants point out, neither of these courts had before them the testimony of Fortner discussed above.

Enterprises would not have bought houses from any competitor of the Homes Division.

Recent cases have recognized that actual foreclosure of competition must be shown to establish an illegal tying arrangement. *Grossman Development Co.* v. *Detroit Lions, Inc.*, 1973-2 Trade Cases §74,790 at pp. 95,939-95,940 (E.D. Mich. 1973), *aff'd w/o opinion*, 503 F. 2d 1404 (6th Cir. 1974); *Coniglio* v. *Highwood Services, Inc.*, 495 F. 2d 1286 (2nd Cir. 1974), *cert. denied*, 419 U. S. 1022 (1974). We do not interpret Fortner's testimony as indicating that no competition was actually foreclosed by the tie-in. The portion of the testimony directly responsive to the question asked shows only that Fortner would not have bought U .S. Steel homes without the financing, not that he would not have bought other homes. The thrust of the total testimony clearly shows that someone, either Fortner Enterprises or others for whom Fortner would have handled sales of houses, would have bought the homes of competitors of U. S. Steel if no similar credit had been offered, and thus that some competition was foreclosed.[5]

As we have concluded that the district court correctly found that a violation of Section 1 was established, it is unnecessary to consider whether the finding of a violation of Section 2 may also be upheld.

AFFIRMED.

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[5]This testimony was as follows:

Q. Mr. Fortner, at the time the October 28, 1960, loan agreement was signed would Fortner Enterprises have purchased the prefabricated house packages manufactured by the United States Steel Corporation without the financing offered by and made available in that loan agreement?

A. No, we would not. We would have stuck with some of the others that we was already having good success with. This Empire Homes, we had built eighty-seven of 'em, or Mr. Walzer had, and we handled them for him without any trouble whatsoever, but they didn't have any financing like that.

Q. When you say that you handled the eighty-seven homes for Mr. Walzer, what do you mean by that, sir?

A. We sold him the ground and, uh, we helped him with his financing and we handled the sales for him.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 75-1208

FORTNER ENTERPRISES, INC. - - *Plaintiff-Appellee*

v.

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORP. - *Defendants-Appellants*

Before: WEICK and MILLER, Circuit Judges, and CECIL, Senior Circuit Judge.

JUDGMENT—Filed October 3, 1975

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiff-Appellee recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.

(s) John P. Hehman
Clerk

A True Copy.

Issued as Mandate:

Attest:

Costs:

Filing fee .....$

Printing .....$

Total .....$

John P. Hehman, Clerk